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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1953

No. 347

COUNTY OF ALLEGHENY, PETITIONER,

vs.

FRANK MASHUDA COMPANY, A PARTNERSHIP, FRANK MASHUDA, STANLEY MASHUDA, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1958
CERTIORARI GRANTED OCTOBER 27, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 15743 Civil Action

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners,

v.

COUNTY OF ALLEGHENY and MARTIN WISE, INC.

Appellants' Appendix

DOCKET ENTRIES.

1957		
May	3	Complaint filed.
May	3	Summons issued.
May	15	Summons returned served May 6, 1957 County of Ally; May 10, 1957 as to Martin W. Wise.
May	23	Motion to Dismiss filed by County of Allegheny.
May	23	Notice of filing Motion to dismiss, by County of Allegheny.
May	23	Interrogatories to County of Allegheny, Defendant, filed by Plaintiff.
May	24	Interrogatories as to Martin W. Wise, Inc., filed by plaintiff.
May	24	Answer of Martin W. Wise, Inc., one of the defts. filed, with acceptance of service thereon, by counsel for plff.

[fol. 2]

June	3	Motion for extension of time to answer interrogatories filed by Martin W. Wise, one of defts.

1957

June 3 Notice of filing Motion filed by deft., County of Allegheny.

June 3 Motion that interrogatories to County of Allegheny shall not be taken filed by deft., County of Allegheny.

June 11 Opposition to County of Allegheny's Motion that interrogatories shall not be taken and counterclaim to compel the County of Allegheny to answer interrogatories filed by plaintiff.

June 11 Opposition to Martin W. Wise, Inc's Motion for extension of time to answer interrogatories and countermotion to compel Martin W. Wise, Inc., to answer interrogatories filed by plff.

June 18 Acceptance of service of copy of answer of deft., Martin W. Wise, filed. by deft. County of Ally.

Sept. 4 Hearing on "All pending Motions" begun and concluded C.A.V. before Gourley, J. Hearing Memo filed.

Sept. 25 Opinion of Gourley, J. and Order granting Motion of County of Allegheny to dismiss this proceeding, filed.

Sept. 26 Pursuant to Opinion and Order entered September 25, 1957, this action is hereby dismissed.
James H. Wallace, Jr., Clerk.

[fol. 3]

Sept. 26 Notices mailed.

Sept. 27 Memorandum Order of Gourley, J. entered dismissing this action as to Martin W. Wise, Inc.,

Sept. 27 Pursuant to Order entered, this action is hereby dismissed as to Martin W. Wise, Inc.,
James H. Wallace, Jr., Clerk

Sept. 27 Notices mailed.

Oct. 18 Notice of Appeal filed as to Martin W. Wise, Inc., by plaintiff.

1957

Oct. 18 Bond for costs on appeal as to Martin W. Wise, filed.

Oct. 18 Notice of Appeal filed as to County of Allegheny, by plaintiff.

Oct. 18 Bond for costs on appeal filed as to County of Allegheny.

Oct. 18 Letters and copy of Notice of Appeals mailed to Clerk U.S. Court of Appeals and to counsel. Letter mailed to Honorable Wallace, S. Gourley, Chief Judge.

Nov. 13 Record on appeal forwarded to Clerk U. S. Court of Appeals for the Third Circuit and letters sent to counsel.

[fol. 4]

IN UNITED STATES DISTRICT COURT

COMPLAINT—Filed May 3, 1957

FIRST COUNT

For a first count plaintiffs sue both defendants in ejectment on information and belief on a cause of action of which the following is a statement:

1. Plaintiffs are partners constituting the Frank Mashuda Company, a partnership registered to do business in Pennsylvania. Each of the plaintiffs is a citizen of the State of Wisconsin.

2. Defendant, County of Allegheny (hereinafter referred to as "the County"), is a political subdivision of the Commonwealth of Pennsylvania and is incorporated under the laws thereof as a second class County.

3. Defendant, Martin W. Wise, Inc., is a corporation incorporated under the laws of the Commonwealth of Pennsylvania.

4. The value of the land in controversy, exclusive of interest and costs, is in excess of Three Thousand Dollars ($3,000.00).

5. Plaintiff partnership is the owner in fee simple of two contiguous parcels of land aggregating eight acres and located in Moon Township, County of Allegheny, Commonwealth of Pennsylvania. Plaintiff partnership acquired an undivided one-half interest in the title to said land by two deeds in May, 1947, from the then owner of record. Plaintiff partnership acquired the remaining one-half interest in said land by deed in May, 1951, from Harrison Construction Company which had been, between 1947 and 1951, tenant in common with plaintiff partnership of the said land.

[fol. 5] 6. On June 16, 1955, the County, by a resolution of its Commissioners, purported to condemn the above land and to acquire it for the County under the latter's alleged power of eminent domain.

7. Such taking was purportedly for the purpose of establishing and maintaining air navigation and terminal facilities, the power of eminent domain for which purposes is conferred on the County by Article XXIV, Act of July 28, 1953; 16 P.S. §5402 (c).

8. Nevertheless, plaintiffs are informed and believe that the County, prior to the taking, had not formulated any definite plan for the use of the land, and had not taken any definite or substantial steps, financial or otherwise, to implement any program for the purported public use. On the contrary, plaintiffs are informed and believe that at the time of the taking the only definite plan and purpose of the County with regard to the said land was that the same would be leased to defendant Martin W. Wise Inc. for the benefit of the said lessee and for no public use. The condemnation in furtherance of the above purposes constitutes an abuse of discretion and bad faith by the County in the exercise of its power of eminent domain, and is illegal, unconstitutional, invalid and void.

9. On or about May 22, 1956, or, alternatively, on some other date unknown to plaintiffs, the County leased all or part of the premises purportedly condemned to defendant Martin W. Wise Inc. which has been, and is now, in possession thereof as lessee.

10. The land so taken has not and is not being used for the purpose of establishing and maintaining air navi-
[fol. 6] gation and terminal facilities for which public purposes alone the County has power to condemn. Nor is the said land being used for any public purpose. By the terms of the lease to Martin W. Wise Inc., the County surrendered control and possession of the land to its lessee and has allowed, does allow, and will continue to allow an improper and unlawful private use to be made of the land by the said lessee; nor has the County any definite plans for the public use thereof.

11. Plaintiffs, specifically, are informed and believe that defendant Martin W. Wise Inc., as lessee, has used and is using all or part of the purportedly condemned land as a base for its operations as a general contractor, few if any of which operations have anything whatsoever to do with the establishment or maintenance of air navigation and terminal facilities.

12. The Act relied upon to support the condemnation, which Act is referred to in Paragraph 7 of this Count, does not authorize the taking of title to and possession of land for the private purpose and use alleged.

13. If the said Act does purport to authorize a taking for the private purpose and use alleged, said Act violates both Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania and the Fourteenth Amendment to the Constitution of the United States; and, in any event, the taking herein alleged violates both Article I, Section 10 of the Constitution of the Commonwealth of Pennsylvania and the Fourteenth Amendment to the Constitution of the United States.

14. The County, having no power to condemn and use land for any purpose and use other than the public pur-
[fol. 7] poses and uses properly designated by statute, title to the land has at all times remained in plaintiff partnership.

15. The County having taken the land for the unlawful private purpose of leasing it to Martin W. Wise Inc., and having used the land for the unlawful purpose for which

it was taken, the possession of the County and of its lessee is wrongful and has damaged plaintiffs by depriving them of the use and peaceful possession of their land.

SECOND COUNT

For a second and alternative count, the plaintiffs sue both defendants on a cause of action of which the following is a statement:

16. Paragraphs 1, 2, 3 and 4 of the First Count are, by reference, incorporated herein with the same force and effect as though here set forth in their entirety.

17. Plaintiff partnership, before and until June 16, 1955, was the owner in fee simple of two contiguous parcels of land aggregating eight acres and located in Moon Township, County of Allegheny, Commonwealth of Pennsylvania. Plaintiffs earlier acquired title to said land in the manner set forth in the second and third sentences of Paragraph 5 of the First Count which sentences are, by reference, incorporated herein with the same force and effect as though here set forth in their entirety.

18. On June 16, 1955, the County by its Commissioners, adopted a resolution condemning the land and vesting fee simple title thereto in the County in the exercise of its [fol. 8] power of eminent domain as purportedly conferred by the Act referred to in Paragraph 7 of the First Count.

19. In pursuance of the condemnation resolution, the County petitioned the Court of Common Pleas, County of Allegheny, Commonwealth of Pennsylvania, to appoint a Board of Viewers to assess damages for the land taken. In pursuance of that petition, viewers were duly appointed. Both the County and plaintiffs have appealed from the award of damages reported by the Board of Viewers, which appeals are now pending in the Court of Common Pleas.

20. Plaintiffs are informed and believe, as set forth more fully in Paragraphs 8 through 11 of the First Count, that the County did not condemn the land for any proper public purpose or use, but for the purpose of surrendering control thereof by leasing it to defendant Martin W. Wise Inc. for a period of time, unknown to plaintiffs, and under

circumstances, similarly unknown, constituting a private use in abuse and excess of the power of eminent domain relied upon. The County thereby wrongfully acquired title to the premises and does and will continue to make such improper use to the detriment of plaintiffs.

21. Paragraphs 12 and 13 of the First Count are, by reference, incorporated herein with the same force and effect as though here set forth in their entirety.

22. Plaintiffs are therefore entitled to a reconveyance of title to the land purportedly condemned, to a return of possession of the said land, and to a cancellation of the [fol. 9] lease thereof from defendant County of Allegheny to defendant Martin W. Wise Inc.

23. Plaintiffs have no adequate remedy at law.

Wherefore, the plaintiffs demand judgment of ouster and damages against the two defendants. In addition, or in the alternative, plaintiffs demand an injunction restraining the County of Allegheny from proceeding further against plaintiffs in the Court of Common Pleas in regard to the said land, a reconveyance of the land to which the County has wrongfully acquired title, a cancellation of the lease to Martin W. Wise Inc., the ouster of defendant Martin W. Wise Inc. from said land, and such additional relief as may be found to be proper.

/s/ Harold R. Schmidt, /s/ Rose, Rose and Houston, Attorneys for Plaintiffs, 717 Oliver Building, Pittsburgh 22, Pa.

[fol. 10]

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed May 23, 1957

And Now, this 23rd day of May, 1957, comes County of Allegheny, one of the defendants above named, and respectfully moves your Honorable Court to dismiss plaintiffs' Complaint for the following reasons:

First: These proceedings involve the exercise by County of Allegheny, a political subdivision of the Commonwealth

of Pennsylvania, of the power of eminent domain under a state statute which provides a statutory remedy for the property owner involved, and such remedy is presently being pursued by the plaintiffs above named in proceedings in the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 1001 July Term, 1956, and no attack has been made in plaintiffs' complaint upon the constitutionality of the state statute involved or the manner in which the remedy under such state statute is being pursued, and, therefore, your Honorable Court has no jurisdiction in this case.

Second: Inasmuch as the Court of Common Pleas of Allegheny County, Pennsylvania, by the appointment of viewers at No. 2913 October Term, 1955, has exercised jurisdiction over the parties and the subject matter set forth in plaintiffs' Complaint, your Honorable Court, even assuming it has concurrent jurisdiction over the parties and the subject matter, may not and should not exercise its jurisdiction over the same res to defeat the jurisdiction of the said Court of Common Pleas of Allegheny County, Pennsylvania. The location of the res involved in these proceedings and in the proceedings before the said Court of Common Pleas, is delineated on plan attached hereto, made part hereof and marked Exhibit "A".

[fol. 11] *Third*: Inasmuch as there is pending before the Court of Common Pleas of Allegheny County, Pennsylvania, at No. 1001 July Term, 1956, by the plaintiffs who are also the plaintiffs in the above entitled proceedings, an appeal from an award of the Board of Viewers appointed by the said Court of Common Pleas, a copy of which appeal is attached hereto, made part hereof and marked Exhibit "B", and which appeal claims damages predicated on the validity of the condemnation of the property of the plaintiffs, under principles of comity plaintiffs should not be permitted to attack such proceedings in this Court.

Fourth: Plaintiffs have failed to state a claim upon which relief can be granted.

Nathaniel K. Beck, County Solicitor, Maurice Louik, Francis A. Barry, Philip Baskin, Assistant County Solicitors, Attorneys for County of Allegheny.

[fol. 12]

EXHIBIT "A" TO MOTION TO DISMISS

(P.9) EXHIBIT "A" TO MOTION TO

PROFILE OF
EAST-WEST RUNWAY (EAST APPROACH)

Glide Angle Slope 50:1 (2.00%)

Center Line Profile of Runway

-0.50%

El. 1080

El. 1100

El. 1000

El. 1134.56

El. 1133.56

200'

500'

0.00'
27.46'

25 20 15 10 5 0 30

(P.9) EXHIBIT "A" TO MOTION TO DISMISS.

PROFILE OF
EAST-WEST RUNWAY (WEST APPROACH)

Glide Angle Slope 50:1 (2.00%)

+1.50%

El. 1167.87

El. 1167.87

200'

58.37'
0.00'

El. 1200

El. 1150

El. 1100

El. 1050

El. 1000

45 0 5 10 15 20 25 30

LEGEND

PRESENT PAVEMENT AREAS AND BUILDINGS

PROJECT No. 9-36-029-5708 and 5709

PRESENT PROPERTY LINE

FUTURE PROPERTY LINE

CLEAR & APPROACH ZONE

WIND ROSE OF 1956
AT GREATER PITTSBURGH AIRPORT

96° 30' E. OF E. W. RUNWAY

CIVIL AERONAUTICS ADMINISTRATION

APPROVED DATE ____ CHIEF AIRPORTS DIVISION

APPROVED DATE ____ DISTRICT AIRPORT ENGINEER

PENNSYLVANIA AERONAUTICS COMMISSION

CHAIRMAN

DIRECTOR

ENGINEER

COUNTY DEPARTMENT OF AVIATION

APPROVED 11/6/57 Edward G. Mumma ASST. DIRECTOR-CHIEF ENG.

APPROVED 11/7/57 J. B. Sweeney DIRECTOR

NOTE:- ALL DISTANCES AND BEARINGS SHOWN HEREON ARE FROM DEED DATA AND THE BEARINGS ARE IN VARIOUS MERIDIANS.

Area 150'x75' under permit to Martin W. Wise, Inc.

EXHIBIT "A"

EXHIBIT "A"

MASTER PLAN
GREATER PITTSBURGH AIRPORT

SITUATE IN
MOON AND FINDLAY TOWNSHIPS
COUNTY OF ALLEGHENY, PA.

SCALE - 1"=400' MARCH, 1957

GRAPHIC SCALE
400 0 400 800 1600

COUNTY COMMISSIONERS
JOHN J. KANE, Chairman
HOWARD B. STEWART — JOHN M. WALKER
COUNTY CONTROLLER - - - - JAMES W. KNOX
DEPT. OF AVIATION — JOHN B. SWEENEY, Director

TYPE OF AIRPORT — INTERCONTINENTAL
HIGHEST ELEVATION — 1167.87 FT.

[fol. 15]

EXHIBIT "B" TO MOTION TO DISMISS

IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

FRANK MASHUDA COMPANY, a partnership, Plaintiff,

v.

COUNTY OF ALLEGHENY, Defendant.

No. 1001 July Term, 1956

PETITION FOR APPEAL FROM AWARD OF THE BOARD OF VIEWERS

To the Honorable, the Judges of Said Court:

Your petitioner, FRANK MASHUDA COMPANY, a partnership, respectfully represents:

1. That by Resolution duly adopted by the Board of County Commissioners of County of Allegheny on June 16, 1955, and in conformance with the provisions of Article XXIV of the Second Class County Code, it was resolved that the County of Allegheny acquire by condemnation certain lands owned by the Frank Mashuda Company situate in Moon Township, Allegheny County, Pennsylvania, for the purpose of establishing and maintaining thereon air navigation and terminal facilities, and in connection therewith to take private property and acquire title thereto in fee simple.

2. Said property owned by the Frank Mashuda Company is hereby particularly described as follows:

ALL those certain two tracts or pieces of land contiguous and adjacent to each other, situate in Moon [fol. 16] Township, County of Allegheny, and State of Pennsylvania, bounded and described as follows, to wit:

PARCEL 1: BEGINNING at a point on the Westerly side of a Public Highway, Sixty (60) feet wide, known as State Highway Application No. 4625 and also known as Carnot and Beers School Road, said point being on the North line of land conveyed by Albert Springer and wife to Ernest N. Chambordon, same line recorded in Deed Book No. 5870, Volume 2674, page 559, dated February 14, 1941, as "South Seventy-eight degrees six minutes West (S. 78° 06′ W.)"; thence along said line of land formerly of Ernst N. Chambordon, et ux., now owned by Ralph E. Chambordon, et ux., South Seventy-eight degrees six minutes West (S. 78° 06′ W.) for a distance Six hundred twenty-five and eight-tenths (625.8) feet to a point; thence along other land of Frank Mashuda Company North Four degrees Eleven mintes East (N. 4° 11′ E.) for a distance of Three hundred fifty-eight and six-tenths (358.6) feet to a point; thence by same land South Eighty-five degrees Forty-nine minutes East (S. 85° 49′ E.) for a distance of Two hundred seventy-two and eight-tenths (272.8) feet to a point; thence by a line extending North Four degrees Eleven minutes East (N. 4° 11′ E.) partly along other land of Frank Mashuda Company and partly along the easterly line of land of Harry W. and Mary Jane Bell, for a total distance of Three hundred sixty-nine and four-tenths (369.4) feet to a point on the Southerly side of a township road; thence along the southerly side of said township road, parallel to and sixteen and five-[fol. 17] tenths (16.5) feet off center line, South Seventy-three degrees one minute thirty-seven seconds East (S. 73° 01′ 37″ E.) for a distance of Three hundred seven and three-tenths (307.3) feet to a point on the aforesaid westerly side of a public highway sixty (60) feet wide, known as State Highway Application No. 4625 and also known as Carnot and Beers School Road; thence southwardly along the westerly side of said public highway, parallel to and thirty (30) feet off center line, for a distance of Four hundred and ninety-five (495) feet, more or less to the place of beginning.

CONTAINING six (6) acres.

HAVING thereon erected a sheet metal building.

PARCEL 2: BEGINNING at a point Six hundred fifty-five and eight-tenths (655.8) feet southwestwardly from the center of a public highway sixty (60) feet wide, known as State Highway Application No. 4625 and also known as Carnot and Beers School Road, said point being on the north line of land conveyed by Albert Springer and wife to Ernest N. Chambordon, same line recorded in Deed Book No. 5870, Volume 2674, page 559, dated February 14, 1941, as "South Seventy-eight degrees six minutes West (S. 78° 06′ W.)"; thence along said line of land formerly of Ernest N. Chambordon, et ux., now owned by Ralph E. Chambordon, et ux., South Seventy-eight degrees six minutes West (S. 78° 06′ W.) for a distance of Two hundred sixty-six and two-tenths (266.2) feet to a point on the line of land of West Realty Company's "Airport Estates" Plan of Lots; thence along said line North Twenty-two de-
[fol. 18] grees two minutes twenty-seven seconds East (N. 22° 02′ 27″ E.) for a distance of Two hundred sixty-eight and seven-tenths (268.7) feet to a point; thence by the same land North Four degrees eleven minutes East (N. 4° 11′ E.) for a distance of Two hundred one and four-tenths (201.4) feet to a point; thence by a line extending South Eighty-five degrees forty-nine minutes East (S. 85° 49′ E.) partly along land of West Realty Company and partly along the southerly line of land of Harry W. and Mary Jane Bell for a total distance of Four hundred forty-six and two-tenths (446.2) feet to a point at the southeasterly corner of land of said Harry W. Bell, et ux., thence along other land of Frank Mashuda Company South Four degrees eleven minutes West (S. 4° 11′ W.) for a distance of Twenty-four and seven-tenths (24.7) feet to a point; thence by same land North Eighty-five degrees forty-nine minutes West (N. 85° 49′ W.) for a distance of Two hundred seventy-two and eight-tenths (272.8) feet to a point; thence by same land South Four degrees eleven minutes West (S. 4° 11′ W.) for a distance of Three hundred fifty-eight and six-tenths (358.6) feet to the place of beginning.

CONTAINING two (2) acres.

3. On September 22, 1955 at No. 2911 October Term, 1955, the County of Allegheny petitioned and obtained the appointment of viewers by Your Honorable Court to ascertain and award just compensation for any taking, injury or destruction occasioned to the property of plaintiff by the aforesaid condemnation.

[fol. 19] 4. The said viewers in a report filed and confirmed nisi on March 29, 1956 found Frank Mashuda Company to be the owner of property above described situate in the Township of Moon, as more particularly described in plan or survey attached as part of the viewers' report, and determined the damages to said property to be $52,644.00, including compensation for delay in payment up to the date of the report.

5. The award of the Board of Viewers to Frank Mashuda Company, as set forth in paragraph "4" hereof, is unjust and unreasonable in that the damages awarded are far less than the actual value of the property taken and condemned.

6. Your petitioner avers, therefore, that an injustice has been done to it by the said Board of Viewers, and the said Frank Mashuda Company hereby appeals from the report of the said Board, and demands a trial by jury according to the course of the common law.

And your petitioner will ever pray, etc.

Frank Mashuda Company

By s/ Frank Mashuda
A partner

Counsel for Petitioner

Rose, Rose and Houston

By s/ John L. Laubach, Jr.
s/ Harold R. Schmidt

[fol. 20] *Duly sworn to by Frank Mashuda, jurat omitted in printing.*

[fol. 21]

IN UNITED STATES DISTRICT COURT

ANSWER TO PLAINTIFFS' COMPLAINT ON BEHALF OF DEFENDANT, MARTIN W. WISE, INC.—Filed May 24, 1957

Martin W. Wise, Inc., one of the Defendants in the above entitled matter, through its Attorneys, Carl Brandt and Brandt, Riester, Brandt & Malone, makes the following Answer to Plaintiffs' Complaint heretofore filed:

FIRST COUNT

First

That the Defendant, Martin W. Wise, Inc., has caused an investigation to be made of the facts set forth in the first paragraph of Plaintiffs' Complaint and has been unable to determine the truth or falsity of the same, such information being wholly within the knowledge of the Plaintiffs and, if material, proof thereof is demanded at the trial of this cause.

Second

That the allegations contained in Paragraph 2 of Plaintiffs' Complaint are admitted.

Third

That the allegations contained in Paragraph 3 of Plaintiffs' Complaint are admitted.

Fourth

That the allegations contained in Paragraph 4 of Plaintiffs' Complaint are admitted.

Fifth

That the allegations contained in Paragraph 5 of Plaintiffs' Complaint are not within the knowledge of the Defendant, Martin W. Wise, Inc. and, if material, proof thereof is demanded at the trial of this cause.

[fol. 22] *Sixth*

That the allegations contained in Paragraph 6 of Plaintiffs' Complaint are admitted.

Seventh

That the allegations contained in Paragraph 7 of Plaintiffs' Complaint are admitted.

Eighth

That the allegations contained in Paragraph 8 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that the allegations contained in the first sentence thereof are wholly beyond the knowledge of the Defendant and, if material, proof thereof is demanded at the trial of this cause.

With respect to the allegations contained in the second sentence thereof, the Defendant, Martin W. Wise, Inc., is without any knowledge with regard to the advice and belief of the Plaintiffs. Hoewever, (sic) if the Plaintiffs were so advised, then the Defendant, Martin W. Wise, Inc., specifically denies such allegations and, to the contrary, avers that at the time of the taking, said Defendant had no relationship whatsoever with the County of Allegheny, the other Defendant herein, either as lessee, permittee, bailee, party of a contract or any other relationship with respect to the use of the said lands and had no intention at that time to enter into any such relationship.

With respect to the allegations contained in the third sentence thereof, the Defendant, Martin W. Wise, Inc., is advised, believes and therefore avers that the same is a conclusion of law and need not be answered.

[fol. 23] *Ninth*

That the allegations contained in Paragraph 9 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that on May 22, 1956, the Board of County Commissioners duly enacted a Resolution authorizing a Permit to be issued to the Defendant, Martin W. Wise, Inc., to occupy a portion of the land so condemned under the terms and conditions set forth therein,

a true and correct copy of which is attached hereto, the provisions of which are made a part hereof by reference thereto, and marked Exhibit "A".

Tenth

That the allegations contained in Paragraph 10 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that the allegations contained in the first sentence thereof are not within the knowledge of the Defendant, Martin W. Wise, Inc., and, if material, proof thereof is demanded at the trial of this cause.

With respect to the allegations contained in the second sentence thereof, such information is not within the knowledge of the Defendant, Martin W. Wise, Inc., and, if material, proof thereof is demanded at the trial of this cause.

With respect to the allegations contained in the third sentence thereof, the same are specifically denied. To the contrary, it is averred that the County of Allegheny, pursuant to the said Permit hereinbefore referred to, has granted Martin W. Wise, Inc., permission, to use certain described land "in connection with contracts of Permittee for construction of concrete pavement at Airport".

[fol. 24]

Eleventh

That the allegations contained in Paragraph 11 of Plaintiffs' Complaint are denied as stated.

To the contrary, it is averred that the Defendant, Martin W. Wise, Inc. has used and is using the property granted under the Permit for the storage of construction materials and equipment and a batching bin only in connection with Contract No. 88G1, dated May 22, 1956, and Contract No. 8F1, dated June 19, 1956, entered into with the County of Allegheny for the purpose of establishing and maintaining air navigation and terminal facilities at the Greater Pittsburgh Airport.

Twelfth

That the allegations contained in Paragraph 12 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Thirteenth

That the allegations contained in Paragraph 13 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Fourteenth

That the allegations contained in Paragraph 14 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Fifteenth

That the allegations contained in Paragraph 15 of Plaintiffs' Complaint are conclusions of law and need not be answered.

[fol. 25] SECOND COUNT

Sixteenth

That by way of answer to the allegations contained in Paragraph 16 of Plaintiffs' Complaint, the Defendant, Martin W. Wise, Inc., incorporates its answers to Paragraphs Nos. 1, 2, 3 and 4 of said Complaint by reference hereto, with the same force and effect as though they were here set forth in their entirety.

Seventeenth

That the allegations contained in Paragraph 17 of Plaintiffs' Complaint are not within the knowledge of the Defendant, Martin W. Wise, Inc., and, if material, proof thereof is demanded at the trial of this cause.

Eighteenth

That the allegations contained in Paragraph 18 of Plaintiffs' Complaint are admitted.

Nineteenth

That the allegations contained in Paragraph 19 of Plaintiffs' Complaint are admitted.

Twentieth

That the allegations contained in Paragraph 20 of Plaintiffs' Complaint are denied as stated.

With respect to the allegations contained in the first sentence thereof, the Defendant, Martin W. Wise, Inc., is without any knowledge with regard to the advice and belief of the Plaintiffs. However, if the Plaintiffs were so advised, then the Defendant, Martin W. Wise, Inc., specifically denies such allegations and, to the contrary, avers that at the time of the taking, said Defendant had no relationship what-
[fol. 26] soever with the County of Allegheny, the other Defendant herein, either as lessee, permittee, bailee, party of a contract or any other relationship with respect to the use of the said lands and had no intention at the time to enter into any such relationship.

With respect to the allegations contained in the second sentence, the Defendant, Martin W. Wise, Inc., is advised, believes and therefore avers that the same is a conclusion of law and need not be answered.

Twenty-first

That the allegations contained in Paragraph 21 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Twenty-second

That the allegations contained in Paragraph 22 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Twenty-third

That the allegations contained in Paragraph 23 of Plaintiffs' Complaint are conclusions of law and need not be answered.

Wherefore, the Defendant, Martin W. Wise, Inc., demands judgment in its favor.

Brandt, Riester, Brandt & Malone, By .....,
Carl Brandt, Attorney for Defendant, Martin W. Wise, Inc.

[fol. 27]

EXHIBIT "A" TO ANSWER TO PLAINTIFFS' COMPLAINT

COUNTY OF ALLEGHENY
Pittsburgh 19, Pennsylvania

GREATER PITTSBURGH AIRPORT

PERMIT

The COUNTY OF ALLEGHENY, a political subdivision of the Commonwealth of Pennsylvania, hereinafter called "County", hereby grants to MARTIN W. WISE, INC., a corporation organized under the laws of the State of Pennsylvania, hereinafter called "Permittee", the hereinafter described privileges at the Greater Pittsburgh Airport, hereinafter referred to as "Airport", located in Moon and Findlay Townships, Allegheny County, Pennsylvania, in accordance with the terms and conditions herein set forth, and the said Permittee agrees to pay the charges herein specified and to perform all other obligations imposed upon it under said terms and conditions.

1. County hereby grants to Permittee permission to use at Airport an area 75′ x 150′, containing 11,250 square feet, for the storage of construction materials and equipment and the erection of a batching bin in connection with contracts of Permittee for construction of concrete pavement at Airport. Said area is shown and designated by metes and bounds in the plan attached hereto and marked "Exhibit A2".

2. This Permit is effective as of the first day of June, 1956, and continuing for a period of twelve (12) months thereafter unless sooner revoked as herein provided.

3. Permittee shall pay to County for the permission herein granted the annual sum of THIRTEEN HUNDRED FIFTY ($1350.00) DOLLARS in installments of ONE HUNDRED TWELVE [fol. 28] and 50/100 ($112.50). DOLLARS, payable monthly in advance. All payments hereunder shall be made at the office of the Director of the Department of Aviation, Room 134-M Terminal Building, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania. All checks, drafts, or United

States money orders shall be drawn to the order of County of Allegheny.

4. Throughout the term of this Permit, Permittee shall maintain public liability insurance in the amount of Fifty Thousand ($50,000.00) Dollars for each person, One Hundred Thousand ($100,000.00) Dollars for each accident, and Fifty Thousand ($50,000.00) Dollars for damage to property for each accident. Permittee shall maintain Workmen's Compensation insurance covering all persons employed by Permittee therein. Certificates evidencing the maintenance of all of such types of insurance shall be furnished to County within ten (10) days after the execution of this Permit, and said certificates shall evidence all of said types of insurance to be noncancellable by the insuring company or companies except upon thirty (30) days' notice to County.

5. Permittee agrees to indemnify and hold harmless County from all claims and damands of whatever nature of third persons for personal injuries, including death, or property damages as well as liability for taxes or assessments of any kind which by law may or can be levied upon County arising out of the operation of Permittee herein, or for any wrongful act or omission on the part of Permittee, or agents, servants, employees and invitees of Permittee.

6. Permittee agrees to use the premises only for the express purpose or purposes hereinbefore stated. County has applied for and received a grant or grants of money [fol. 29] from the Administrator of Civil Aeronautics pursuant to the Federal Airport Act of 1946, as amended and supplemented, and County may in the future apply for and receive further such grants, and in connection therewith County has undertaken and may in the future undertake certain obligations respecting its operation of the Airport and the activities of its Permittees and Concessionaires thereon; and Permittee, therefore, covenants and agrees that if the Administrator of Civil Aeronautics or any other governmental officer or body having jurisdiction over the enforcement of the obligations of County in connection with Federal Airport Aid shall make any orders, recommendations or suggestions respecting the performance by Per-

mittee of its obligations under this Permit, Permittee shall promptly comply therewith at the time or times when and to the extent that the Director may direct.

7. No signs, posters or similar devices shall be erected, displayed or maintained in or about the space herein granted without written approval of the Director, and any not approved by him may be removed by the said Director at the expense of Permittee and without liability of any kind whatsoever to County.

8. Permittee and its employees shall have no right to park vehicles within the Airport beyond a reasonable loading or discharging time, except in regular parking areas and upon payment of the regular charges therefor.

9. The operations of Permittee, the employees and invitees and those doing business with Permittee shall be conducted in an orderly and proper manner and so as not to annoy or disturb or be offensive to others at the Airport. County shall have the right to object to Permittee as to [fol. 30] the demeanor, conduct and appearance of Permittee's employees, invitees and those doing business with Permittee, whereupon Permittee will take all steps necessary to remove the cause of the objection.

10. County shall have the right to terminate and revoke the permission hereby granted in its entirety or in part at the option of County immediately upon the happening of any of the following events:

1. Filing by Permittee of a voluntary petition in bankruptcy.
2. The making by Permittee of any general assignments for the benefit of creditors.
3. The occurrence of any act which operates to deprive Permittee of the rights, powers and privileges necessary for the proper conduct and operation of the business described in this Permit.
4. The abandonment or discontinuance of the operation of the business described in this Permit.

5. The failure by Permittee to perform, keep and observe any of the terms, covenants and conditions hereunder contained on the part of Permittee to be performed, kept or observed.

6. Notwithstanding any other rights which County may have to cancel and revoke this Permit, the Board of County Commissioners may cancel and revoke this Permit at any time that it resolves that the continuance of the permission herein granted to Permittee would be contrary and detrimental to the interest of County or the public interest and welfare.

[fol. 31] The cancellation or revocation of this Permit shall not relieve Permittee of any liabilities or obligations hereunder which shall have accrued prior to the effective date of cancellation or revocation.

11. This Permit and the space herein granted shall not be assigned, tranferred, sublet or otherwise disposed of without the written approval of County, nor shall such permission be subject to devise or inheritance upon the death of Permittee without the written consent of County.

12. No officer or employee in any department of County shall have any permit, concession or privilege, or any interest or connection, directly or indirectly with any permit, concession or privilege pertaining to the Greater Pittsburgh Airport.

13. It is understood and agreed that nothing herein contained is intended or shall be construed to in any wise create or establish the relationship of co-partners between the parties hereto, or as constituting Permittee the general representative or agent of County for any purpose whatsoever.

14. In addition to the express terms and conditions hereof, Permittee shall be bound by all the laws, ordinances, rules, regulations, directives, memoranda and requirements of the United States Government, Commonwealth of Pennsylvania and County of Allegheny, and their respective

agencies, issued for the operation and conduct of the Airport, all of which are hereby made an integral part of this Permit. Permittee shall comply, at its own cost and expense, with all Federal, State and local laws, ordinances, rules or regulations now or hereinafter in force govern-
[fol. 32] ing the operation of its business at the Airport. Permittee shall obtain and pay for all licenses and permits necessary for the operation of its business under this Permit, and shall pay all fees and charges assessed under Federal, State or local statutes or ordinances insofar as they are applicable thereto. Permittee shall protect, indemnify and save harmless the County, its authorized agents or representatives from and against any damage, penalty, fine, judgment, expense or charge which may be suffered, imposed, assessed or incurred by reason of the violation, disregard or breach of any law, ordinance, order or regulation, or by reason of any act, neglect or omission of Permittee, or by any agent or employee of Permittee.

15. County shall not be liable to Permittee or its employees for any damages to any property at any time in said space or at the Airport resulting from any casualty or accident in or about said Airport howsoever occurring, or for damage done to Permittee's property by any other permittee, concessionaire or visitor at the Airport in any manner whatsoever.

16. County shall not be responsible to Permittee for any non-observance of rules and regulations on the part of any other permittee or concessionaire.

17. Definition of the terms as used herein:

(a) The term "Director" shall mean the person from time to time designated by the Board of County Commissioners of Allegheny County as the Director of the Department of Aviation of Allegheny County.

[fol. 33] (b) Whenever in this Permit, including all endorsements and exhibits thereto, the pronoun "it" or the adjective "its" may occur referring to Permittee, the said pronoun or adjective shall be deemed and taken to mean "it", "he", "him", "she", "her", "they", "them", or "its", "his", "her", "hers", "their" or "theirs", as the circumstances of the reference may require.

18. Notice as herein provided shall be sufficiently rendered or given if the same be in writing and sent by registered mail addressed to Permittee at Locust Place and Centennial Avenue, Sewickley, Pennsylvania, or at the latest address that Permittee may substitute therefor by notice in writing to County, or left at such address, or delivered to Permittee's representative, and the time of such note shall be deemed to be the time when the same is mailed, left or delivered as herein provided. Any notice from Permittee to County shall be validly given if sent by registered mail to the Director, Department of Aviation, Room 134-M, Terminal Building, Greater Pittsburgh Airport, Pittsburgh, Pennsylvania.

[fol. 34] IN WITNESS WHEREOF, this Permit has been duly executed this 9 day of April, 1957.

COUNTY OF ALLEGHENY
By .....
/s/ Howard B. Stewart
/s/ John M. Walker
County Commissioners

MARTIN W. WISE, INC.
By /s/ M. W. Wise
President

ATTEST:
/s/ M. M. Snyder [SEAL]
Chief Clerk

ATTEST:
/s/ M. V. Wise [SEAL]
Secretary

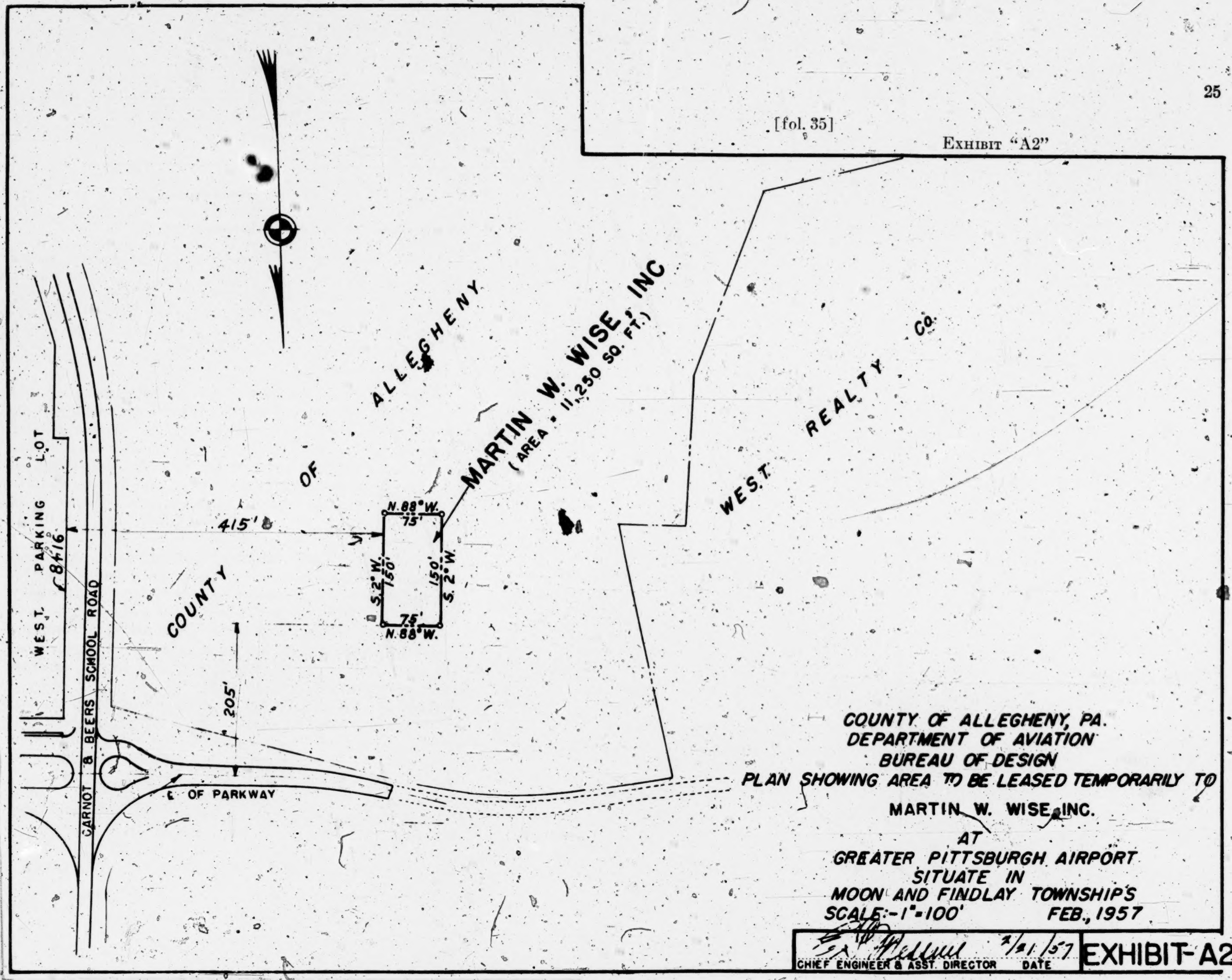
This Permit approved this 28th day of March, 1957.

/s/ E. G. Messner
Acting Director,
Dept. of Aviation

APPROVED AS TO FORM:
/s/ Nathaniel K. Beck
County Solicitor
/s/ A. L. McLaughlin III
Asst. County Solicitor

[fol. 35]

EXHIBIT "A2"



COUNTY OF ALLEGHENY, PA.
DEPARTMENT OF AVIATION
BUREAU OF DESIGN
PLAN SHOWING AREA TO BE LEASED TEMPORARILY TO
MARTIN W. WISE, INC.
AT
GREATER PITTSBURGH AIRPORT
SITUATE IN
MOON AND FINDLAY TOWNSHIPS
SCALE:-1"=100' FEB., 1957

E. W. Weddell 2/21/57
CHIEF ENGINEER & ASST. DIRECTOR DATE

EXHIBIT-A2

[fol. 37]

IN UNITED STATES DISTRICT COURT

OPINION—September 25, 1957

WALLACE S. GOURLEY, Chief Judge:

This matter comes before the court on motion of the political subdivision of Allegheny County, Pennsylvania, to dismiss a complaint challenging the validity and constitutionality of a condemnation proceeding relative to property situate in Allegheny County, Pennsylvania, but owned by residents of the State of Wisconsin.

The issue posed may be thus stated:

Where diversity of citizenship exists between the owners of property condemned by a political subdivision in the Commonwealth of Pennsylvania, and no proceeding has been filed in the state jurisdiction to question the validity of the condemnation proceeding, does the United States District Court have legal authority to consider the validity of the condemnation proceeding and award damages, or in the alternative enjoin the political subdivision from proceeding in the state jurisdiction?

In view of plaintiffs' demand for judgment of ouster and damages, and/or for injunctive relief to be effectuated by reconveyance of the situs to which the County of Allegheny has acquired title, the relief demanded necessarily entails the use of the equity powers of this court. The Supreme Court of Pennsylvania has enunciated the doctrine that the remedy of a person who is damaged by the exercise of a governmental authority of the power of eminent domain is an action to assess damages for such taking; an action in equity to enjoin the taking cannot be maintained and cannot be prosecuted in the equity branch of the court. Lowen, Appellant, v. Shapiro, 389 Pa. 610; Creasy, Appellant v. Lawler, 389 Pa. 635.

[fol. 38] In addition, it is significant to note that, upon a most exhaustive review of the authorities, neither counsel nor the court has found legal precedent in the United States District Court for the granting of injunctive relief where the matter involved was pending in state court pro-

ceedings. The authorities to the contrary have held that where condemnation proceedings are pending in a state court, the United States District Court will refuse to enjoin such proceedings. Baber v. Texas Utilities Co., 228 F. 2d 665 (5 Cir.); Collins v. Laclede Gas Co., 237 F. 2d 633 (8 Cir.).

I am satisfied that although diversity of citizenship exists between the parties, grounding jurisdiction in this court, nevertheless the United States District Court should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding. I cannot but help so conclude, especially where in the instant proceeding no action has been taken in the state jurisdiction to question the validity of the state condemnation proceeding. I must give emphasis to the disinclination of federal authority to interfere in state matters until state remedies have been exhausted.

An appropriate Order is entered.

ORDER DISMISSING COMPLAINT—September 25, 1957

And Now, this 25 day of September, 1957, the motion of the County of Allegheny to dismiss the within proceeding is granted.

/s/ Wallace S. Gourley, CDJ, Chief Judge.

[fol. 39]

MEMORANDUM ORDER RE DISMISSAL OF MARTIN W. WISE, INC.—September 27, 1957

In this action the court entered an order on the 25th day of September, 1957, in which the proceeding was dismissed as to the County of Allegheny. The cause of action against Martin W. Wise, Inc., must basically rest on a sustainable cause of action against the County of Allegheny since Martin W. Wise, Inc., is in possession of the premises by virtue of a lease executed by the County of Allegheny in favor of Martin W. Wise, Inc. Although Defendant Wise has answered, denying the allegations of plaintiffs, the cause of action of plaintiffs against Wise can rise no higher

than plaintiffs' cause of action against the County of Allegheny.

In view of the foregoing and for the reasons set forth in the opinion filed on the 25th day of September, 1957, the proceeding against Martin W. Wise, Inc., is dismissed.

/s/ Wallace S. Gourley, Chief Judge.

[fol. 40]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,434 and 12,435

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners, Appellants,

v.

COUNTY OF ALLEGHENY and MARTIN W. WISE, INC.

Appeal from the United States District Court for the Western District of Pennsylvania

Argued April 17, 1958

Before Goodrich, McLaughlin and Staley, Circuit Judges.

OPINION OF THE COURT—Filed June 10, 1958

By GOODRICH, Circuit Judge:

This is an appeal from a judgment for the defendant entered on a motion to dismiss an action by which the plaintiffs sought an adjudication of the propriety of an eminent domain proceeding. Since the judgment was rendered without a hearing on the facts, we take the plaintiffs' allegations as true for the purpose of this appeal.

[fol. 41] The plaintiffs, citizens of Wisconsin, own land adjacent to the Greater Pittsburgh Airport which is located in Allegheny County, Pennsylvania. On June 16, 1955, the

County purported to condemn plaintiffs' land for the alleged purpose of establishing and maintaining air navigation and terminal facilities at the airport.[1] Viewers were appointed to assess compensation. The viewers reported and both the County and the plaintiffs took an appeal to the Court of Common Pleas for Allegheny County.[2] In the meantime the County had leased a part of the property condemned to Martin W. Wise, Inc., a Pennsylvania corporation engaged in general contracting, for the purpose of storing its tools and heavy equipment thereon.

On May 3, 1957, the plaintiffs brought this action in the United States District Court for the Western District of Pennsylvania suing the County of Allegheny and Martin W. Wise, Inc., federal jurisdiction being based on diversity of citizenship. The basis of the complaint is that the land was not condemned for a public purpose and, therefore, the taking is invalid. The plaintiffs allege that at the time of the condemnation the County had not formulated a plan to utilize the property for the purposes stated and has not to the present initiated any substantial steps to implement a program with such a goal. Instead, it is claimed, the County's sole purpose was to permit the private use of the lots by Wise which, in any event, has been the only result of the taking so far. A judgment of ouster and damages is demanded. In the alternative, plaintiffs, in the district court, sought an order restraining the County from proceeding further, a reconveyance of the title of the land to the plaintiffs and a cancellation of the lease to Wise. The district judge, although recognizing his jurisdiction in the case, dismissed the complaint expressing a disinclination to interfere with the state condemnation procedure.

[fol. 42] The point which has most concerned us about this case is the manner of attacking, under Pennsylvania law, the propriety of a purported exercise of the power of eminent domain. All through the sections of the statute cited above there is a rather particularized method of appointing

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[1] The authority for condemnation for airport purposes is found in Pa. Stat. Ann. tit. 16, § 5402(c) (Purdon 1956).

[2] This procedure is in accordance with *id.* §§ 5601-33.

viewers, having them report, fixing the damages and so on. There is nothing in those sections which we can see which talks about anything but the fixing of the amount of damages. Inspection of the plaintiffs' petition in the Common Pleas Court of Allegheny County shows only a claim that the amount awarded by the viewers was inadequate. Indeed, the District Court for the Eastern District of Pennsylvania has said, "The right to condemn cannot be raised at the trial following condemnation. Such a trial is merely of a feigned issue, to determine solely the quantum of compensation." *Colgate v. Philadelphia Elec. Power Co.*, 20 F.2d 263, 264 (E.D. Pa. 1928). *Cf. Lehigh & New England R.R. Petition*, 7 Northhampton 77 (Pa. C.P. 1899).

The plaintiffs have cited a line of decisions in which an independent action has been maintained to test the validity of condemnation proceedings. We find the cases to be in point. *Spann v. Joint Board of School Directors*, 381 Pa. 338, 113 A.2d 281 (1955); *Colove v. Borough of Robesonia*, 364 Pa. 626, 73 A.2d 679 (1950); *Pioneer Coal Co. v. Cherrytree and D. R. R.*, 272 Pa. 43, 116 Atl. 45 (1922); *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487 (1913); *Vinton Colliery Co. v. Blacklick & Y.C.R.R.*, 226 Pa. 131, 75 Atl. 185 (1910); *Caruthers v. Peoples Natural Gas Co.*, 155 Pa. Super. 332, 38 A.2d 713 (1944); *C. P. Struse & Sons, Inc. v. Reading Co.*, 12 Pa. D. & C. 465 (Phila. Co. C. P. 1929); *Youghiogeny River Coal Co. v. Robertson*, 1 Pa. Dist. 809 (Alleg. Co. C. P. 1892). A statutory foundation for the procedure followed in these cases may be found in PA. STAT. ANN. tit. 12 § 1315 (Purdon 1953).

These authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that [fol. 43] in which compensation is awarded. We think an equal jurisdiction lies in the federal district court assuming that the required diversity exists as it does here. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905). We do not find merit in any of the arguments presented by the County for not accepting that jurisdiction.

In the first place there is no conflict here with 28 U.S.C. § 2283. That section has to do with "injunctions to stay

proceedings in a State court." However, plaintiffs do not press before us their alternative theory of relief in the nature of a restraining order. They do stress their remedies at law, especially ejectment, which do not have the same preventive effect on the state court proceedings.

Moreover, since the question involved before the federal court need not, and perhaps cannot, be raised in the pending state action, the exercise of diversity jurisdiction here will not directly interfere with the Common Pleas Court's handling of its case. True, if the plaintiffs are successful in attacking the validity of the purported condemnation, there will no longer be a need for an adjudication of damages, because there will be no damages. But that is nothing more than would occur as a result of taking the same steps in a state court. Furthermore, we see no inconsistency in the plaintiffs complaining about the amount of damages awarded by the viewers in the Common Pleas court in Pittsburgh and at the same time attacking, in a separate federal proceeding, the legality of what the County has done.

The fact that the plaintiffs waited two and a half years after the resolution of condemnation before attacking its legality does not, of itself, bar them from relief because of laches. It seems to us to make the case stronger because they waited a time to see what use the County was either making or planning to make of the land.

Our conclusion is that the federal court has jurisdiction to entertain the suit brought in this case and the plaintiffs are entitled to a trial on their allegations of fact.

[fol. 44] The judgment of the district court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

[fol. 45]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,434

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners, Appellants,

vs.

COUNTY OF ALLEGHENY and MARTIN W. WISE, INC.

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Goodrich, McLaughlin and Staley, Circuit Judges.

JUDGMENT—June 10, 1958

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest: Ida O. Creskoff, Clerk.

[fol. 46]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,435

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA and JOSEPHINE MASHUDA, partners, Appellants,

vs.

COUNTY OF ALLEGHENY and MARTIN W. WISE, INC.

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: Goodrich, McLaughlin and Staley, Circuit Judges.

JUDGMENT—June 10, 1958

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest: Ida O. Creskoff, Clerk.

[fol. 47] [File endorsement omitted]

[fol. 48]

IN UNITED STATES COURT OF APPEALS

PETITION FOR REHEARING—Filed June 23, 1958

To the Honorable, the Judges of Said Court:

County of Allegheny, Appellee in the above appeals, respectfully petitions your Honorable Court to grant a

rehearing, before the court in banc, for the following reasons:

1. (a) Only a week prior to filing of your Honorable Court's opinion (Appendix A hereof), and therefore too late to be considered by this Court, the Pennsylvania Supreme Court declared the Pennsylvania law on the principal question involved in these appeals to be directly contrary to the conclusion of your Honorable Court as to the Pennsylvania law.

(b) As your Honorable Court stated in its opinion: "the point which has most concerned (the Court) about this case is the manner of attacking, under Pennsylvania law, the propriety of a power of eminent domain." (Appendix A, page 11). Your Honorable Court then determined that the Board of Viewers could only assess damages and that since a separate proceeding was required to attack the legality of the taking, a question of law as well as fact, a suit based upon diversity of citizenship could be brought upon this question in a Federal court as well as in a separate proceeding in the State court. (Appendix A, pages 11-12).

(c) In an unanimous opinion, filed June 3, 1958 in the case of *Gardner, et al.*, v. *County of Allegheny, et al.*, Nos. 72, 73, 74, 75, 76 March Term, 1958, (Appendix B hereof) the Pennsylvania Supreme Court decided that in an eminent domain proceeding involving the County of Allegheny, the Board of Viewers, originally, (and the Court [fol. 49] of Common Pleas, on appeal from the determination of the Board of Viewers), "must decide *all relevant questions of law* or fact before it can competently make an award of damages or assessment of benefits." (Emphasis supplied), Appendix B, page 24).

2. If the decision and opinion of your Honorable Court is permitted to stand it will have the following serious effects:

(a.) It will be directly contrary to the decision of the highest appellate court of Pennsylvania on a question of the interpretation of a State law which is of vital public importance. For the question of the jurisdiction, powers and duties of the Board of Viewers under the Second Class

County Code is wholly a question of State law and the Federal courts must recognize State law as declared by the State courts.

(b.) It may seriously confuse the statutory procedures for eminent domain which have been followed in Pennsylvania for many years, particularly at a time when the County is embarking upon a large redevelopment program which will involve the exercise of the power of eminent domain to a great extent.

(c.) (i) It will interfere with proceedings in a State court, which has jurisdiction *over the parties* hereto, and which has jurisdiction *over the subject matter,* to-wit, whether there was a proper taking. As counsel for the appellants admitted to this Court in his argument, there is no Federal constitutional question involved—what is involved is simply whether Allegheny County properly took property under a constitutional State statute. The appel- [fol. 50] lants admitted in proceedings before the Board of Viewers that the County properly took the property. Now they claim after-discovered evidence of an improper taking. Since the proceedings in the State court are still open and since the State court has jurisdiction to determine the question of the taking, the decision of your Honorable Court, if permitted to stand, would be a clear instance of staying a State court from exercise of its jurisdiction in pending proceedings simply because of diversity of citizenship.

(ii) Even if we assume the appellants could, by reason of diversity of citizenship, have brought an action in a Federal court, to test the legality of the taking by Allegheny County, they cannot ask the Federal court to determine that issue after first subjecting themselves to the jurisdiction of the Board of Viewers and of the Court of Common Pleas which has the power and jurisdiction to determine that question. It is as though a plaintiff with a choice to sue in either a State or Federal court had sued in a State court and then subsequently brought a suit in a Federal court on one of the issues within the jurisdiction of the State court.

(iii) Furthermore, the decision of this Court would raise a very grave issue of *res judicata*. The Pennsylvania Supreme Court has stated that the Board of Viewers and the Court of Common Pleas, on appeal from a decision of that Board, has jurisdiction to determine *all questions of law* as well as of fact involved in a taking. In the proceedings now before the Board of Viewers the appellants here have admitted a proper taking. Since the State court has jurisdiction over that matter, unless that court determines, on petition of appellants in that proceeding, [fol. 51] that there has not been a proper taking, the appellants will be bound. The question then arises whether in a subsequent suit filed in another court, the appellants can re-try an issue which was presented to and determined in another court which has jurisdiction over that issue.

(iv) The cases cited by this Court in its opinion, when it did not have the benefit of the decision of the Pennsylvania Supreme Court in the *Gardner* case, are therefore inapplicable. Furthermore, it should be pointed out that all of those cases involved *private corporations, not municipal corporations,* and that the statute cited by this Court, *12 PS § 1315,* does not deal with the procedure of eminent domain as its (sic) affects Allegheny County, which is governed by the Second Class County Code.

3. The situation which the Pennsylvania Supreme Court was called upon to decide in the *Gardner* case is squarely in point.

(a) In a prior appeal, *Gardner et al., v. County of Allegheny et al.,* at No. 382 Pa. 88, 114 A. 2d 491, the Pennsylvania Supreme Court had decided that the plaintiffs, in an equity suit against the County of Allegheny, could not have a question of eminent domain decided by the Equity side of the Common Pleas Court, since that court has no jurisdiction to award damages for a taking.

(b) Subsequently, the additional defendants, various airlines, filed an Answer setting forth as one of their defenses, that Allegheny County had taken the plaintiffs' property under its right of eminent domain. The County filed preliminary objections claiming that this defense must be

stricken since the Common Pleas Court in equity had no [fol. 52] jurisdiction to determine the question of a taking by the County, which question must first be presented to a Board of Viewers in accordance with statutory procedure.

(c) Before the Pennsylvania Supreme Court, the airlines and plaintiffs contended that this defense concerned only the question of a taking and not the question of damages, and that the lower court could determine the question of a taking, leaving the question of damages to a Board of Viewers in a subsequent and separate proceeding.

(d) The County's position was that all questions concerning a taking by the County, including the question of whether there was a proper taking, must first be submitted to a Board of Viewers under Pennsylvania statutory procedure. The County's position to the Supreme Court was stated as follows in its brief:

> "The Board of Viewers in an eminent domain proceeding does more than merely fix an amount of damages. The Board of Viewers must determine whether there has been a taking of property, to whom an award for damages should be made, and make an assessment of the amount of the damages. This is exclusively within the jurisdiction of the Board of Viewers, and a court, sitting in equity, has no jurisdiction in this matter".

This same argument was presented to your Honorable Court.

(e) The Pennsylvania Supreme Court stated (Appendix B, page 23):

> "We decide that the Court of Equity does not have jurisdiction under the pleadings in this case, *to deter-* [fol. 53] *mine* that there was a 'taking' of plaintiffs' properties, or, amount of damages resulting from a 'taking' . . .
>
> "The Second Class County Code provides, as hereinabove set forth, that viewers shall be appointed 'to determine and assess the damages for the land, prop-

erty or material taken, injured or destroyed . . .' See also: Article I, § 10; Article XVI, § 8 of the Pennsylvania Constitution; Amendments to the Constitution of the United States, Article V. As the County of Allegheny points out, if a Court of Equity could or would make a determination that there was a taking of an easement, this would be contrary to the spirit and, we believe, to the language of the Code and of our prior decisions and would raise new and difficult questions: Would the Board of Viewers be bound by such a decision or could the Board make a determination that there was a 'taking' of a fee simple instead of an easement, or that there was no 'taking' at all? As the present Chief Justice said in *Powell Appeal*, 385 Pa. 467,* 123 A. 2d. 650 page 471-472): 'While the Act does not expressly authorize viewers to decide questions other than such as relate to land values or damages or benefits to the affected property, *it is implicit that a jury of view must decide all relevant questions of law or fact before it can competently make an award of* [fol. 54] *damages or assessment of benefits:* See case of the Germantown and Perkiomen Turnpike Road Company, 4 Rawle 191 . . . : *(The Viewers) were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject, however, to review by the sessions.'"* ** (Emphasis supplied.)

"It is only fair and just to all parties concerned that the pending equity proceedings by plaintiffs against the County of Allegheny and the Airlines should be and they are hereby stayed until the eminent domain proceedings or the actions of trespass which may be brought by the plaintiffs against some or all of the

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* Where the State Highway Law of 1945 provided for the ascertainment and assessing of damages for land taken for the construction or improvement of any State Highway, but there was *no specific* authority granted to the Court of Quarter Sessions or to the Board of view *to determine* whether there had been a "taking".

** Court of Quarter Sessions. (In the instant case, review is by the Court of Common Pleas).

present defendants have been brought and completed, or have been waived under § 2632 of the Second Class County Code and finally determined in such a proceeding."

4. In view of the importance of this decision in a field so vital to municipal governments in Pennsylvania as the field of eminent domain, and in view of the direct conflict between the decision of your Honorable Court and the almost simultaneous decision of the Pennsylvania Supreme Court, County of Allegheny respectfully submits that your Honorable Court grant a rehearing in this case.

5. In view of the great public importance of the question involved to the County of Allegheny, as well as to other political subdivisions throughout Pennsylvania, it is re- [fol. 55] spectfully submitted that the rehearing be before the entire Court in banc.

Respectfully submitted,

Maurice Louik, County Solicitor, Philip Baskin, Asst. County Solicitor, Francis A. Barry, Asst. County Solicitor, Attorneys for Petitioners.

CERTIFICATE

I, Maurice Louik, of counsel for County of Allegheny, appellee above, certify that the Petition for Rehearing presented in this case is presented in good faith and not for delay.

Dated June 19, 1958.

Maurice Louik, County Solicitor.

[fol. 56]

APPENDIX A

Omitted. Printed side page 28 ante.

[fol. 61]

Appendix B

In the Supreme Court of Pennsylvania
Western District

Nos. 72, 73, 74, 75, 76—March Term, 1958

Gardner et al.

v.

County of Allegheny et al.

Appeals of the County of Allegheny, Raising a Question of Jurisdiction, from the Orders, dated January 2, 1958, of the Court of Common Pleas of Allegheny County at Nos. 1289, 1640, 1288, 1707 and 1706 respectively, October Term, 1953, five companion cases filed by different plaintiffs, but having the same defendants.

Opinion of the Court—Filed June 3, 1958

Bell, J.:

The County of Allegheny appealed from an Order of the Court of Common Pleas of Allegheny County which dismissed the preliminary objections filed by the County to certain *new matter* in the Answer of the defendant Airlines.* A complaint in equity had been filed by the respective owners of five properties which are situate adjacent to the Greater Pittsburgh Airport in Moon and Findlay Townships, Allegheny County. In the Court below, in this Court, and in all prior proceedings before this Court, the [fol. 62] five actions were consolidated for argument and trial.

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* The appeal was taken under the Act of March 5, 1925, P.L. 23, § 1, 12 PS 672.

The complaint in equity of the respective property owners sought an injunction against the County and against all of the Airline defendants to restrain allegedly dangerous and illegal flights of aircraft over their respective properties. Plaintiffs averred that these flights, which number 8 every ten to fifteen minutes, and which endangered their lives and their homes, were unlawful trespasses. The owners asked as an alternative relief, that the Court (a) find that the acts of the defendants constituted a "taking" and (b) award to each plaintiff the fair market value of his property. The defendants filed preliminary objections to each of these complaints; these objections were overruled by the Court below. Upon appeal, this Court decided in *Gardner* v. *Allegheny County et al.*, 382 Pa. 88, 114 A. 2d 491, that on the pleadings, as they then existed, the Court below (1) was correct in overruling the preliminary objections of the defendants to that part of the complaint which sought an injunction, (2) but was in error in overruling the County's objection to plaintiffs' claim for a "taking" of their respective properties, and (3) directed the lower Court to enter a modified Decree consistent with this Court's Opinion.

The Court below thereupon entered an Order on September 30, 1955, which was subsequently amended by its Order dated March 15, 1956, the effect of which was to strike from the plaintiffs' complaint all claims for damages for a "taking", leaving only a claim for injunctive relief and for damages for trespass. The lower Court wisely [fol. 63] permitted the defendants to file Answers including new matter.

The Airlines in paragraph 19a of their Answers averred the following new matter:

"19a. The County of Allegheny, one of the defendants, has constructed and maintains the Greater Pittsburgh Airport in Moon Township, Allegheny County, Pennsylvania, as a public improvement, pursuant to statutory authority to provide airport and air transport facilities for the use of the public. To enable the public to have facilities for air transport of passengers and cargo, which facilities are essential for the functioning of the airport, it is necessary

that airplanes *enter and leave** the airport by passing *through the air space above the plaintiffs' property below 500 feet.* Allegheny County has entered into a lease with each of the airline defendants granting to them for certain considerations the right to ingress and egress to and from the said airport.

"As a direct and necessary consequence of the construction and operation of the airport by the said County, the said County, *under its right of eminent domain,* has appropriated for public use, *avigation easements* for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. The airline defendants aver that their planes pass through the air space over the plaintiffs' property only to the extent necessary to enter and leave the airport and in the exercise of their right to use the avigation easements which the County has appropriated. [fol. 64] Wherefore, the airline defendants deny the right of the plaintiffs to enjoin their use of the avigation easements appropriated for public use by the County of Allegheny."

Defendants further averred that "all of the flights of aircraft in and out of the Greater Pittsburgh Airport have been in accordance with the regulations issued by the Civil Aeronautics Administration [Board] . . . and are never lower than necessary for safe landing and takeoff."

The County of Allegheny thereupon filed preliminary objections to paragraph 19a of the new matter in the Airlines' Answers on the ground that the allegations presented a question which this Court, in our prior decision, had decided was not within the jurisdiction of a Court of Equity.

This appeal, which is based upon new facts, raises new questions which were not before this Court, as well as questions which were not definitely decided by this Court in *Gardner v. Allegheny County*, 382 Pa., supra. The lower Court interpreted our prior decision as prohibiting a Court of Equity from making an award of damages for a "tak-

* Italics throughout, ours.

ing", but did not prohibit the Court of Equity *from determining* that there had been a "taking", and did not prohibit a Court of Equity from awarding damages for trespasses.* The County of Allegheny, on the other hand, contends that a Court of Equity—for technical, legal and practical reasons—should not be entitled to determine the question of [fol. 65] whether there had been a "taking", and then leave to a board of viewers merely the question of assessing the damages.

Novel, intricate and difficult questions are raised by this appeal. Each party has presented technical, as well as practical, reasons why their position should be sustained. We believe it would aid a solution of these problems if we pointed out what was and what was not decided by this Court in *Gardner* v. *Allegheny County*, 382 Pa., supra. It must be recalled that this case, as well as the prior case, arose upon preliminary objections to pleadings, which of course admitted all averments of fact made in the complaints in the prior cases and in the Answer in the present case: *DeJoseph* v. *Zambelli*, 392 Pa. ....., ... A. 2d .....; *Liggins Estate*, 392 Pa. ....., ... A. 2d .....; *Eways* v. *Reading Parking Authority*, 385 Pa. 592, 124 A. 2d 92; *Gardner* v. *Allegheny County*, 382 Pa., supra.

In our prior decision in 382 Pa., this Court held, inter alia: (1) A Court of Equity has jurisdiction to enjoin repeated trespasses in the air which endanger the lives and homes of complainants, as well as trespasses on the land of a property owner, and likewise to enjoin a nuisance. (2) A Court of Equity has jurisdiction to enjoin continuing flights of aircraft over a land owner's property at heights which are below the minimum safe altitudes of flight. Whether a Court of Equity has jurisdiction to enjoin aircraft flights which are within the air space necessary for safe takeoffs or landings if such flights imminently endanger a property owner's life or property, was not decided. (3) Flights of aircraft over privately owned land

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* It is obvious that a Court of Equity could award damages for trespasses only if, and after it found that plaintiffs were entitled to equitable relief, because of the danger to the lives or properties of plaintiffs.

which are so low and so frequent as to be a direct and immediate interference with the use and enjoyment of the [fol. 66] land amount to a "taking" of the land or, depending on the facts, may amount to a trespass or a nuisance. Even though only an "easement" of flight was taken, that easement, if permanent and not merely temporary, would normally be the equivalent of a fee simple interest. (4) The Act of May 2, 1929, P.L. 1278, which was reenacted in the Second Class Code, specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding when compensation cannot be agreed upon. (5) A Court of Equity has no jurisdiction to assess damages for a "taking" of land.*

On the question of eminent domain, which was so vigorously argued in the present appeal, this Court said in 382 Pa.:

"Nevertheless, a Court of Equity has no power or jurisdiction to assess damages for a 'taking'. The condemnation of property for airdromes and landing fields is authorized by the Act of May 2, 1929, P.L. 1278, Art. V, §496, since reenacted in the Second Class County Code, 16 PS 2151-2401 et seq. Section 2151-2403 provides: 'The proceedings for the condemnation of lands under the provisions of this article [Aeronautics] and for the assessment of damages for property taken, injured or destroyed shall be conducted in the same manner as provided [by law for the condemnation of land:]'

"Art. VII, §518, of the Act of May 2, 1929, P.L. 1278, now reenacted in the Second Class County Code, 16 PS [fol. 67] 2151-2608(a), sets forth the provisions for the condemnation of land above referred to. This section provides: 'In case the board of commissioners or a majority of them and the parties interested in the land, property or material appropriated, injured or destroyed by the county

* An Opinion for the Court, a Concurring Opinion, a separate Concurring Opinion, and an Opinion Concurring in part and Dissenting in part were filed in this case, which is exceptionally unusual in this Court and was probably necessitated by the somewhat indefinite statement of facts and the novel questions of law presented.

fail to agree upon the compensation to be made for the land, property or material so taken, injured or destroyed, upon petition .... to the court of common pleas of said county, the said court shall appoint three viewers from the county board of viewers, ...

"'The said viewers ... having viewed the premises ... shall hear all parties interested and their witnesses, and, ... shall estimate, determine and assess the damages for the land, property or material taken, injured or destroyed, and to whom the same is payable, ...': Article VII, §523.

"That Act specifically directs the appointment of viewers to ascertain, determine and assess damages in any condemnation proceeding, when compensation cannot be agreed upon. Nowhere in the Act is there any provision for a Court in Equity to fix and determine the value of plaintiffs' property. This Court, in Hastings Appeal, 374 Pa. 120, 97 A. 2d 11, said (page 125): 'A board of view is not common law remedy; it exists only where it has been provided for by statute: see Locust Street Subway Case, supra, [319 Pa.] at p. 165. In the situations for which it has been provided, it is the only available remedy: Power v. Borough of Ridgway, 149 Pa. 317, 318, 24 A. 307; and McKee v. City of Pittsburgh, 7 Pa. Superior Ct. 397, 400; ...'

"....

[fol. 68] "While there is a well established general principle that once equitable jurisdiction has attached, equity can round out the whole circle of controversy and thus do complete justice between the parties: See: Wortex Mills, Inc. v. Textile Workers Union of America, 380 Pa. 3, 109 A. 2d 815, and cases cited therein; nevertheless, this principle cannot be extended and gives no power or jurisdiction to a Court of equity to grant relief in matters in which a specific and adequate remedy or different jurisdiction is provided by statute: United Drug Co. v. Kovacs, 279 Pa. 132, 123 A. 654; Century Distilling Co. v. Continental Distilling Co., 106 F. 2d 486.

"We therefore held that a Court of Equity has no power or jurisdiction to determine or assess damages for a 'taking' of plaintiffs' property and is consequently

without jurisdiction to grant that phase of the alternative relief demanded by the plaintiffs."

While the members of this Court differed on several questions there involved, all of the Court were unanimously of the opinion that a Court of Equity could not award compensation for a "taking".

It is clear from the present pleadings that plaintiffs have been damaged, and the questions are: who must pay for this damage, what action or actions can be brought by plaintiffs, and who are proper parties therein? The answer to these questions will depend, in the last analysis, upon the facts developed at the trial of the case. For example, the nature and extent of the trespasses; the amount of interference with plaintiffs' lives or properties; whether frequent and dangerous and unlawful flights will amount to trespasses or by their nature, character and frequency, are so permanent as to amount to a "taking"; [fol. 69] and if a "taking", whether it be a "taking" of an easement or a fee simple—all of these questions will, in the last analysis, we repeat, depend upon the facts which are produced at the trial at law.

We are aware of the fact that the Airlines have pleaded, and the County has admitted, by its preliminary objections to the new matter contained in the Airlines' answer, that the County, ". . . under its right of eminent domain, has appropriated for public use, avigation easements for the flight of planes through the air space over the plaintiffs' property to the extent necessary to enable them to enter and leave the airport. . . . Allegheny County has entered into a lease with each of the airline defendants granting to them for certain [valuable] considerations the right of ingress and egress to and from the said airport . . . [and] it is necessary that airplanes enter and leave the airport by passing through the air space above the plaintiffs' property below 500 feet."

Everyone knows that it is necessary for planes *in landings and takeoffs* to pass through the air space below 500 feet. The Airlines and the County have admitted for the first time that airplanes pass through the air space above

the plaintiffs' properties below 500 feet in takeoffs and landings.

The parties agree that private airlines have no right of eminent domain. The County of Allegheny, pursuant to statutory authority, has appropriated for public use, under its power of eminent domain, avigation easements for the flight of planes and has constructed, operated and leased this airport. Under the present pleadings, the [fol. 70] County of Allegheny is liable in eminent domain proceedings for damages to plaintiffs' properties—plaintiffs have the choice to bring an action of trespass, or proceedings for a "taking" against the County of Allegheny for their damages, depending upon the facts provable by plaintiffs.

We decide that the Court of Equity does not have jurisdiction under the pleadings in this case *to determine* that there was a "taking" of plaintiffs' properties, or the amount of damages resulting from a "taking" of the easement, or of the fee of the plaintiffs, as the case may be.

The Second Class County Code provides, as hereinabove set forth, that viewers shall be appointed "to determine and assess the damages for the land, property or material taken, injured or destroyed . . . ." See also: Article I, § 10; Article XVI, § 8 of the Pennsylvania Constitution; Amendments to the Constitution of the United States, Article V. As the County of Allegheny points out, if a Court of Equity could or would make a determination that there was a taking of an easement, this would be contrary to the spirit, and, we believe, to the language of the Code and of our prior decisions and would raise new and difficult questions: Would the Board of Viewers be bound by such a decision or could the Board make a determination that there was a "taking" of a fee simple instead of an easement, or that there was no "taking" at all? As the present Chief Justice said in *Powell Appeal*, 385 Pa. 467,* 123 A. 2d 650 (page

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*Where the State Highway Law of 1945 provided for the ascertainment and assessing of damages for land taken for the construction or improvement of any State Highway, but there was *no specific* authority granted to the Court of Quarter Sessions or to the board of view *to determine* whether there had been a "taking".

[fol. 71] 471-472): "While the Act does not expressly authorize viewers to decide questions other than such as relate to land values or damages or benefits to the affected property, it is implicit that a jury of view must decide all relevant questions of law or fact before it can competently make an award of damages or assessment of benefits: see Case of the Germantown and Perkiomen Turnpike Road Company, 4 Rawle 191. . . . '[The viewers] were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject however to review by the sessions.'" **

It is only fair and just to all parties concerned that the pending equity proceedings by plaintiffs against the County of Allegheny and the Airlines should be and they are hereby stayed until the eminent domain proceedings or the actions of trespass which may be brought by the plaintiffs against some or all of the present defendants have been brought and completed, or have been waived under § 2632 of the Second Class County Code and finally determined in such a proceeding. This stay of proceedings shall be without prejudice to the right of each party to subsequently file, if desired, answers, replications and other pertinent pleadings.

The Orders of the Court of Common Pleas of Allegheny County dated January 2, 1958, at October Term, 1953, Nos. 1289, 1640, 1288, 1706 and 1707 are hereby reversed, and proceedings are hereby stayed in accordance with this Opinion. Each party shall bear his, its and their respective costs in this appeal.

[fol. 72]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,434 and 12,435

[Title omitted]

OPINION SUR PETITION FOR REHEARING—July 10, 1958

Before: Goodrich, McLaughlin and Staley, Circuit Judges.

Counsel for Allegheny County have based their petition for rehearing largely on a decision by the Supreme Court of Pennsylvania on June 3, 1958, in the case of *Gardner* v. *County of Allegheny*. The Court has examined that decision with great care and is unanimously of the conclusion that it does not control or even assist in the decision of this case. The petition for rehearing is, therefore, denied.

By The Court, Goodrich, Circuit Judge.

[fol. 73] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,434 and 12,435

[Title omitted]

Present: Goodrich, McLaughlin and Staley, Circuit Judges.

ORDER DENYING REHEARING—July 10, 1958

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest: Harriet G. Humphrys, Chief Deputy Clerk.

[fol. 75] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 76]

SUPREME COURT OF THE UNITED STATES

No. 347—October Term, 1958

[Title omitted]

ORDER ALLOWING CERTIORARI—October 27, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is assigned for argument immediately following No. 157. Each case is allotted a total of one hour and a half for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

KEY TO BRIEFS

1 PETITION FOR WRIT OF CERTIORARI

2 BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

3 SUPPLEMENT TO PETITION AND APPENDIX

4 RESPONDENTS' REPLY TO SUPPLEMENTAL PETITION FOR CERTIORARI

5 BRIEF FOR PETITIONER AND APPENDIX

6 BRIEF FOR RESPONDENTS AND APPENDIX

7 PETITIONER'S PETITION FOR REHEARING OF DECISION AND FOR MODIFICATION THEREO

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SEP 8 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

NO. 347

OCTOBER TERM, 1958

COUNTY OF ALLEGHENY, Petitioner,

v.

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA, and JOSEPHINE MASHUDA, partners, Respondents (Plaintiffs-Appellants below).

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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Supreme Court of the United States

OCTOBER TERM, 1958

NO. .....

COUNTY OF ALLEGHENY, Petitioner,

v.

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA, and JOSEPHINE MASHUDA, partners, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, County of Allegheny, original defendant, and appellee in the court below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on June 10, 1958, (A. 8), rehearing denied July 10, 1958, (A. 10) reversing the judgment of the District Court of the United States for the Western District of Pennsylvania, entered September 25, 1957, which granted the motion of the County of Allegheny to dismiss the complaint of the respondents, original plaintiffs, and appellant in the court below. (A.2).*

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*References to the Appendix (A and B) attached to this petition are by the page numbers thereof, as A.1, A.2, etc., and B.1, B.2, etc.

References to the printed record in the court below are by "R" followed by the page number, as R.1a, R.2a, etc.

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania, dated September 25, 1957, (A. 1-2) is recorded in 154 F. Supp. 628. The opinion of the United States Court of Appeals for the Third Circuit, dated June 10, 1958, (A. 4-8) is reported at 256 F. 2d 241, and the opinion of the said court in denying a petition for rehearing (A. 10), dated July 10, 1958, is reported at 256 F. 2d 243.

JURISDICTION

Jurisdiction to issue the writ is found in the provisions of Title 28, United States Code, Section 1254 (1).

The judgment of the Circuit Court of Appeals was entered on June 10, 1958, (A. 8), and the petition for rehearing was denied on July 10, 1958, (A. 10).

QUESTIONS PRESENTED

1.

Where the County of Allegheny has condemned property under its state statutory power of eminent domain and the County and property owners involved have been proceeding in a state court to which both the County and property owners had appealed, in accordance with state statutory procedure, does the United States District Court have any jurisdiction to entertain a suit by the property owners to set aside the condemnation on the grounds that the taking of the property is not for a public purpose under the state constitution and statutes, which question the property owners have not attemped to raise in the state court?

2.

Even if the District Court does have jurisdiction, in view of the pending proceedings in the state court and the failure of the plaintiffs to raise in the state court any question concerning the propriety of the exercise of the County's state statutory power, do not principles of comity require that the District Court refuse to exercise its jurisdiction pending submission of that question to the state court?

STATUTES INVOLVED

United States

28 U.S.C. § 2283, Act of June 25, 1948, c. 646, 62 Stat. 968.

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Pennsylvania

16 Purdon Pa. Stat. Ann.

Secs. 5401—5408 (Second Class County Code, Act of July 28, 1953, P. L. 723, Art. XXIV, Aeronautics.

Secs. 5601—5633 (*id*, Art. XXVI, Eminent Domain and Injury to Property.

Pertinent provisions of these sections are printed in Appendix B hereof at pages 11-14.

STATEMENT OF THE CASE

On May 3, 1957, respondents (referred to as plaintiffs in this Statement) filed their complaint in the District Court for the Western District of Pennsylvania, basing jurisdiction in that Court on diversity of citizenship. (R. 4a-9a). Respondents sought ejectment of the defendants from certain property previously taken by the County of Allegheny, or in the alternative, an injunction to restrain the County of Allegheny from proceeding further against the plaintiffs in certain proceedings pending in the Court of Common Pleas of Allegheny County. (R. 9a). The County of Allegheny filed a motion to dismiss the complaint. (R. 10a-11a).

Following argument on the motion to dismiss, on September 25, 1957, the District Court, by Gourley, C. J., entered an order dismissing plaintiffs' complaint against County of Allegheny and filed an accompanying opinion. (R. 35a-38a; A. 1-2). On September 27, Judge Gourley also entered an order dismissing the action as to Martin W. Wise, Inc., the second named defendant. (R. 39a; A. 3). From those two orders plaintiffs filed appeals to the Court of Appeals for the Third Circuit, which, as set forth previously, reversed the judgment of the District Court and denied the County of Allegheny's petition for rehearing.

The basis of plaintiffs' complaint is that at the time their property was taken by the County the only plan of the County with regard to the land was that it should be leased to the second named defendant, Martin W. Wise, Inc., for its benefit and for no public use, and that condemnation for such a purpose is illegal, unconstitu-

tional and invalid under the state and federal constitutions. (R. 4a-9a).

The County of Allegheny's motion to dismiss was based on the grounds that the plaintiffs and the County had been proceeding in the Court of Common Pleas of Allegheny County on the condemnation, that the plaintiffs had raised no question in that court, or in the preceding Viewers' proceedings, concerning the illegality of the taking, and that because of the pending state court proceedings, the District Court had no jurisdiction over the subject matter involved in the plaintiffs' complaint, and further, even if it had jurisdiction, it should decline to exercise its jurisdiction pending the submission of plaintiffs' question in the state court proceedings. (R. 10a-11a).

The plaintiffs' property had been taken by the County under its right of eminent domain on June 16, 1955, by resolution of the Board of County Commissioners condemning the property for use at the Greater Pittsburgh Airport owned by the County. (R. 5a; 7--8a).[1] On September 22, 1955, pursuant to statutory provisions, the County filed a petition for the appointment of viewers in the Court of Common Pleas of Allegheny County (R.

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1. Article XXIV of the Second Class County Code, 16 Purd. Stat. Ann. Secs. 5401—5408 (1956) deals with Aeronautics. In Sec. 5402(c) is found authority for condemnation for airport purposes and Sec. 5403 provides that proceedings for condemnation shall follow the procedure in Article XXVI of the Second Class County Code, 16 Purd. Pa. Stat. Ann. Secs. 5601 - 5633, which deals with Eminent Domain procedure. Pertinent provisions of the above statutes are printed in Appendix B hereof at pp. 11-14.

18a) and on March 29, 1956, after hearing, the Board of Viewers filed their report awarding the sum of $52,644.00 to plaintiffs (R. 19a). Both the plaintiffs and County appealed to the Court of Common Pleas from that award and these appeals are pending in that court. During those proceedings the plaintiffs at no time disputed the propriety of the action of the County Commissioners. In fact, the plaintiffs in their appeal from the viewers' award in the Court of Common Pleas expressly averred that the resolution of the County Commissioners was duly adopted in conformance with the provisions of the Second Class County Code. (R. 15a).

So far as the defendant, Martin W. Wise, Inc., was concerned that defendant was awarded a contract by the County for construction work at the Airport and the County permitted Martin W. Wise, Inc., to use approximately one-fourth of an acre of the eight acres formerly owned by the plaintiffs for temporary storage of construction materials and equipment during construction of concrete paving at the airport (R. 27a-33a). The County had a right to terminate and revoke the permit at any time. (R. 30a).

At no time have plaintiffs filed any action in the state court to question the validity of the taking.

The District Court, in its brief opinion accompanying its order dismissing the action, stated that neither counsel nor the Court had found any legal precedent for the granting of plaintiff's requested relief when the matter involved was pending in state court proceedings and that on the contrary the authorities have refused to interfere in such proceedings, citing *Baber v. Texas Utilities Co.*, 228 F. 2d 665 (5 Cir., 1956); *Collins v.*

LaClede Gas Company, 237 F. 2d 633 (8 Cir., 1956). (A. 2). The District Court further stated (A. 2):

> "I am satisfied that although diversity of citizenship exists between the parties, grounding jurisdiction in this Court, nevertheless, the United States District Court should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding. I cannot but help so conclude, especially where in the instant proceeding, no action has been taken in the State jurisdiction to question the validity of the State condemnation proceeding. I must give emphasis to the disinclination of Federal authority to interfere in State matters until state remedies have been exhausted."

The Circuit Court, in its opinion, did not refer to the cases from the other circuits cited in the opinion of the District Court or to any cases concerning the applicability of Section 2283. The basis of the Circuit Court's decision was that there is nothing in the Pennsylvania statutory provisions governing the exercise of the power of eminent domain which could permit the respondents to raise the question of the propriety of the taking in the proceedings pending in the state court, or in fact any question other than the determination of damages. (A. 5, 7.)

In its petition for rehearing[1] petitioner pointed out that the Supreme Court of Pennsylvania had, on

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1—A copy of said petition is attached to this petition for writ of certiorari and the appendix of the petition for rehearing sets forth the decision of the Pennsylvania Supreme Court.

June 3, 1958, just one week prior to filing of the opinion of the Circuit Court, filed an opinion in the case of *Gardner, v. County of Allegheny,* 393 Pa. 120, 142 A. 2d 187 (1958), which petitioner submitted was diametrically opposed to the Circuit Court's opinion on the question of the scope of the state court's jurisdiction in eminent domain proceedings since the Pennsylvania Supreme Court stated that questions of law as well as determinations of damages were to be decided under the statutory procedure. The Circuit Court, in a brief opinion, stated that the *Gardner* case was inapplicable. (A.10)

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I.

The decision of the Circuit Court of Appeals is in conflict with the decisions of the Fifth Circuit and the Eighth Circuit on the same question which cases the District Court also cited in support of its decision in the instant case: *Baber v. Texas Utilities Co.*, 228 F. 2d 665 (5 Cir., 1956); *Collins v. LaClede Gas Company, et al.*, 237 F. 2d 633, (8 Cir., 1956); *cert. den.* 352 U.S. 1025.

The *Collins* case specifically holds that an action to enjoin condemnation proceedings in a state court because the condemnation was alleged to be unconstitutional is not within the statutory exceptions set forth in 28 U.S.C. 2283. The basis of the complaint in the *Collins* case is similar, if not identical, to the basis of the complaint in the instant case. In the *Baber* case, the plaintiffs there also requested the District Court to enjoin condemnation proceedings in the state court alleging that the state court proceedings denied plaintiffs' rights of due process under the United States Constitution. The Circuit Court denied plaintiffs' right of action in the District Court.

Federal courts have uniformly denied the type of relief requested by plaintiffs in the instant case. *Dillon, et al., v. Kansas City Suburban Belt Railroad Company*, 43 Fed. 109 (Cir. Ct., W.D., Mo., 1890) (court refused to grant an injunction to restrain defendant from proceeding with its condemnation in a state court when the state court had already exercised jurisdiction); *Marblehead Land Company v. Los Angeles County, et*

al., 276 Fed. 805 (D.C.S.D. Cal., 1921) (plaintiffs unsuccessfully sought in the District Court to enjoin Los Angeles County from taking possession and opening a highway condemned in state court proceedings which plaintiffs alleged were improper).

In fact, as the District Court recited in its opinion in the instant case (A. 2), there is not a single federal decision supporting the position of the respondents. The cases cited by the Circuit Court of Appeals in its opinion have nothing to do with the question of conflict between state and federal courts and the Pennsylvania statute cited by the Circuit Court (12 Purd. Stat. 1315, A. 6) is also inapplicable, since it relates to condemnation by private utility corporations and not municipal governments which are governed in Pennsylvania by other specific statutes, (In the case of the County of Allegheny, by the Second Class County Code, pertinent provisions of which are printed in Appendix B, pp. 11-14).

The basis for reversal by the Circuit Court lies in its interpretation of procedure in eminent domain proceedings here involved. The Circuit Court was of the opinion that in the viewers' proceedings and the subsequent appeal to the Court of Common Pleas, only the question of damages could be raised and not any question concerning the propriety of the taking. As is set forth at page 15 of this petition, petitioners believe that the case of *Gardner v. County of Allegheny*, 393 Pa. 120, 142 A. 2d 187 (1958) is contrary to the Circuit Court's opinion in that the *Gardner* case specifically states that the statutory proceedings are not limited to a determination of damages but includes determination of all relevant questions of law. And as is set forth in page 19 of this petition, even if there is still a question whether under

the decision in the *Gardner* case the state court may determine the issue of the propriety of the taking in the pending proceedings, it would be far better practice, and in accordance with the decided cases, that the Circuit Court should have done no more than order a stay of the action in the District Court proceeding pending a decision by the state court on that question.

II.

The decision of the Circuit Court of Appeals is contrary to (A) the prohibition of 28 U.S.C. § 2283, and the decisions of your Honorable Court in connection with the interpretation of the said section: *Leiter Minerals, Inc. v. United States, et al.*, 352 U. S. 220; *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, and (B) the decisions of your Honorable Court even apart from the prohibition of Sec. 2283. *Spector Motor Co. v. McLaughlin*, 323 U.S. 101.

A.

"A Court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or when necessary in aid of its jurisdiction, or to protect or effectuate its judgments." June 25, 1948, c. 646, 62 Stat. 968, 28 U.S.C. Sec. 2283.[1]

Federal courts have no jurisdiction except that conferred by the United States Constitution or federal statutes. *Williams v. Miller*, 48 F. Supp. 277 (D.C. N.D., Cal.

1. The 1948 statute revised an earlier statute, March 3, 1911, c. 231, Sec. 265, 36 Stat. 1162; 28 U.S.C. 1940 ed. Sec. 379. The basic provisions go back to 1793, 1 Stat. 335.

1942), *aff'd.*, 317 U.S. 599, *rehear. den.* 318 U.S. 799; *West Pub. Co. v. McColgan*, 138 F.2d 320 (9 Cir., 1943). It is also clear that the provisions of 28 U.S.C. Sec. 2283 are applicable not only to orders of a federal court directly restraining proceedings of the state court but to all orders of a federal court which necessarily have that effect. *Haines v. Carpenter* 91 U.S. 254; *Harrison, et al. v. Triplex Gold Mines, Ltd., et al.*, 33 F. 2d 667 (1 Cir., 1929).

There seems little question that the effect of the Circuit Court's decision is to stay proceedings in the state court. Not only will the state court refuse to try the question of damages pending the litigation in the federal court on the question of the propriety of the taking, but the state court may refuse to entertain the question if the District Court is forced to pass on it in the instant case. Of course, if the state court should decide, on petition of Allegheny County, to adjudicate the question, then we have the unseemly situation where the same litigants in both state and federal courts are racing to an adjudication of the same question with all the attendant confusion, including questions of *res judicata*, which would subsequently result.

As your Honorable Court has stated repeatedly, the prohibition of Sec. 2283 results from a desire to avoid direct conflicts between state and federal courts and to give courts the first opportunity to pass upon questions involving state actions and state statutes.

So strong is the effect of Sec. 2283 that in *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, the court stated that the District Court could not enjoin an action in the state courts to prevent

picketing despite the applicability of federal labor laws. As was stated at page 518 of 348 U.S.:

> "The prohibition of Sec. 2283 is but continuing evidence of confidence in the state courts reinforced by a desire to avoid direct conflicts between state and federal courts."

A very recent case which discussed the applicability of 28 U.S.C. 2283 is *Leiter Minerals, Inc. v. United States, et al*, 352 U.S. 220 in which the court reviewed the propriety of an injunction against state court proceedings which had been granted by a District Court and sustained by the Court of Appeals.

This case arose out of an action filed by Leiter Minerals, Inc., in a Louisiana state court against mineral lessees of the United States. Plaintiff sought in the state court to have itself declared the owner of mineral rights under land owned by the United States and also requested an accounting. The United States was not a party to the suit in the state court. While proceedings were still pending in the state court, the United States brought an action to quiet title in the mineral rights in the United States District Court for the Eastern District of Louisiana, and also for a preliminary injunction to restrain petitioner from prosecuting its action in the state court. Your Honorable Court, although stating that the restrictions of 28 U.S.C. 2283 did not apply to the United States, nevertheless left no doubt that such a construction would not be applicable if a private party was seeking similar relief.

Your Honorable Court pointed out that the interpretation of a state statute was involved and that it was

preferable to have that decided by the state court. Your Honorable Court stated at page 229 of 352 U.S.:

> "* * * Before attempting to answer them (various questions) and to decide their relation to the issues in the case, we think it advisable to have an interpretation, if possible, of the state statute by the only court than can interpret the statute with finality, the Louisiana Supreme Court."

In the *Leiter* case, *supra, injunctive relief was prohibited even though the United States was a party seeking relief and even though the United States was not a party to the proceedings in the state court, and even though it was held that the United States is not subject to the provisions of 28 U.S.C. 2283.* In the instant case, the plaintiffs are private parties and they subjected themselves to the jurisdiction of the state court in proceedings which are still pending in the state court and they have not attempted to bring before the state court the question of state law which they ask the District Court to rule upon.

As is pointed out at page 19 of this Petition, if there is some question whether the propriety of the taking involved in this case may be determined by the state court in the proceedings presently pending, it certainly would be consistent with the declaration of your Honorable Court to have an interpretation of the state statute by a state court before the District Court is ordered to assume jurisdiction of the case and decide that question.

What is involved in the instant case is simply the propriety of a taking under a state statute, which a state court should first pass upon if possible.

Even in the *Leiter* case where it was decided that Sec. 2283 did not apply to the United States, the judgment of the Circuit Court of Appeals was modified to permit a state court to pass upon the state question involved.

B.

In the case of *Spector Motor Co. v. McLaughlin*, 323 U. S. 101, which did not involve Sec. 2283, your Honorable Court stated that litigation in federal courts involving determination of local law should be withheld pending determination of state questions by the state courts. In that case, it was held that a District Court could not enjoin the enforcement of a Connecticut state tax even though the plaintiffs in the District Court claimed the tax contravened the commerce clause of the United States Constitution. At page 105 of 323 U.S., the Court stated:

> "Avoidance of * * * guesswork by holding the litigation in the federal court until definite determinations on local law are made by the state courts, merely heeds this time honored canon of constitutional adjudication."

III.

The decision of the Circuit Court of Appeals is in direct conflict with the applicable state law, as enunciated by the Supreme Court of Pennsylvania: *Gardner v. County of Allegheny*, 393 Pa. 120, 142 A. 2d 187 (1958). In that case, the Supreme Court of Pennsylvania stated expressly that the function of the Board of Viewers and of the court to which exceptions are taken from the Board's decision is not limited to a determination of damages *but encompasses determina-*

tion of all relevant questions of law. This is directly contrary to the opinion of the Circuit Court.

The Circuit Court in its opinion stated that under Pennsylvania law, a Board of Viewers proceeding, from which an appeal lies to the Court of Common Pleas, may only determine the measure of damages and no other question. (A. 5, 7). The Supreme Court of Pennsylvania, in a case squarely raising that issue, stated that a Board of Viewers "must decide all relevant questions of law or fact before it can competently make an award of damages or assessment of benefits". *Gardner v. County of Allegheny,* 393 Pa. 120, 130, 142 A.2d 187, 193 (1958) (Pet. for Rehear., App. B, pp. 14-24). Although the Circuit Court, in denying County of Allegheny's petition for rehearing, stated the *Gardner* case was inapplicable, the County respectfully submits that the *Gardner* case refutes the Circuit Court's interpretation of state law in this matter. Briefly stated, in the *Gardner* case, the situation was as follows: The plaintiffs sued in equity against County of Allegheny requesting damages and injunctive relief because of low flying planes and *alternatively, for damages for a taking of plaintiffs' property because of the low flying.* The County added various air lines as party defendants. The County in preliminary objections objected to the court's jurisdiction to determine that there had been a taking of plaintiffs' property, the County's position being that a taking must be determined through statutory procedure, that is, by a Board of Viewers, and subsequently by appeal to the courts. In *Gardner v. County of Allegheny,* 382 Pa. 88, 114 A.2d 491 (1955) the Supreme Court sustained the County and stated that a court of equity did not have jurisdiction to assess damages for a taking, this being

for viewers' proceedings. Subsequently, in the court below, the airlines, as an affirmative defense to the complaint, stated that they were without liability since they were flying over property *taken* by the County, in fee or as an easement, and the County gave the airlines permission to fly over said properties. The County again filed preliminary objections protesting that the determination of any legal question concerning any taking must be decided in viewers' proceedings and that the court had no jurisdiction to decide the question even as a matter of defense. The airlines took the position that only the question of damages was within the scope of the exclusive statutory procedure, and that the viewers' proceedings could not decide the legal question of whether there had been a taking. In the 1958 appeal above cited, the Pennsylvania Supreme Court upheld the County's position, and stated that all relevant questions of law concerning a taking, as well as the determination of damages, must be decided in the statutory procedure provided in the Second Class County Code.

As the Pennsylvania Supreme Court stated, before assessing damages, the Board of Viewers must first find there has been a taking. This, of course, must be a proper taking, otherwise there is no power to award damages. *In the instant case, after first admitting the legality of the taking in the pending state proceedings, the respondents now question the legality of the taking.* This is a question which is properly relevant to the proceedings before the viewers and Court of Common Pleas, and should be raised there.

IV.

The decision of the Circuit Court in the instant case is a radical departure from all prior decisions in situations similar to that presented by the instant case and is likely to cause confusion in a field so delicate as the relations between federal and state courts.

The matter is thus one of great public importance to all political subdivisions and courts throughout Pennsylvania and throughout the nation. Because of the decision of the Circuit Court, public improvements under state law will be impeded pending costly and time consuming litigation in both state and federal courts. Furthermore the decision of the Circuit Court disturbs the delicate balance between the state and federal courts and causes, in effect, multiplicity of actions.

As was pointed out by your Honorable Court in *Leiter Minerals, Inc. v. United States, et al*, 352 U.S. 220, 223-224, certiorari was granted because of the "presence of important and difficult questions of federal-state relations".

Although the instant case does not raise the same jurisdictional question as the appeal presently before your Honorable Court, *sub nom, Stevens, et al., v. Creasy, et al.*, . . . October Term, 1958, from the decision of a three judge court in the District Court for the western District of Pennsylvania, decisions by your Honorable Court in that case and the instant case on the questions of state-federal court relations involved will serve as a guide to all courts throughout the nation on jurisdictional questions in eminent domain proceedings by states and political subdivisions thereof, and will also

serve as a guide generally on matters of jurisdiction and comity in state-federal court relations.

It is significant that in the *Creasy* case, when the plaintiffs first filed suit for relief in the District Court for the Western District of Pennsylvania, although the plaintiffs raised a question of constitutionality under the Federal constitution, the District Court stayed proceedings pending *initiation* of a similar action in the Pennsylvania state court on the question of whether the plaintiffs had a remedy under the state statutory procedure. The action of the District Court in the instant case is entirely consistent with the action of that same court in the *Creasy* case. In the instant case, the Circuit Court is ordering the District Court to try a question concerning interpretation of state statutory procedure before a state court has an opportunity to pass on the question, although there is a pending proceeding in the state court in which the respondents in the instant case are parties and have not presented to the state court the question on state law which they are asking the District Court to pass upon.

V.

Even if we were to assume that there is still a question of whether the Common Pleas Court, in the pending proceedings, has jurisdiction to determine the question of the propriety of the taking, the state court should first be given an opportunity to pass on the question since the question is one of interpretation of state law. In no case which petitioner has been able to find, has a federal court rushed so quickly to decide a question of state law, when the possibility is that the question may be decided by the state court in pending state court

proceedings if the question is presented to the court. The most that the Circuit Court should have ordered is that the District Court stay proceedings until plaintiff applied to the Court of Common Pleas (which then had jurisdiction of the parties in eminent domain proceedings) on the question of the propriety of the taking. This was the procedure ordered by your Honorable Court in *Leiter Minerals, Inc. v. United States et al.*, 352 U.S. 220 and by the District Court for the Western District of Pennsylvania initially in the appeal presently pending before your Honorable Court, *sub nom Stevens et al.* Appellants v. *Creasy et al*, Appellees.

As was pointed out to the Circuit Court in the petition for rehearing, not only is it unseemly for a federal court to rush to decide a question of state law which could be decided by a state court, but the confusion which may be caused is obvious. What, for example, if the federal court proceeds to try the issue on the merits and plaintiffs are successful. Suppose then that the County brings an action in the state court to enjoin plaintiffs from taking any action to eject the County. Suppose also that the state court determines that it had jurisdiction to decide the legality of the taking in the proceedings now before it. If the court had jurisdiction of the parties, as it undoubtedly does, and jurisdiction over the subject matter, the plaintiffs not having raised the question in the state court, that question could not be raised in another proceeding. Then we have the delicate question of the effect of res judicata as regards the state court proceedings against the effect of the district court's decision on the merits. This is the type of confusion and conflict which the courts assiduously attempt to avoid. Yet, it is exactly the result to which the Circuit Court's decision will inevitably lead.

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

COUNTY OF ALLEGHENY

By MAURICE LOUIK,
County Solicitor

FRANCIS A. BARRY,
First Assistant County Solicitor;

PHILIP BASKIN,
Special Counsel.

September, 1958

APPENDIX A

Opinion of District Court

WALLACE S. GOURLEY, Chief Judge:

This matter comes before the court on motion of the political subdivision of Allegheny County, Pennsylvania, to dismiss a complaint challenging the validity and constitutionality of a condemnation proceeding relative to property situate in Allegheny County, Pennsylvania, but owned by residents of the State of Wisconsin.

The issue posed may be thus stated:

Where diversity of citizenship exists between the owners of property condemned by a political subdivision in the Commonwealth of Pennsylvania, and no proceeding has been filed in the state jurisdiction to question the validity of the condemnation proceeding, does the United States District Court have legal authority to consider the validity of the condemnation proceeding and award damages, or in the alternative enjoin the political subdivision from proceeding in the state jurisdiction?

In view of plaintiffs' demand for judgment of ouster and damages and/or for injunctive relief to be effectuated by reconveyance of the situs to which the County of Allegheny has acquired title, the relief demanded necessarily entails the use of the equity powers of this court. The Supreme Court of Pennsylvania has enunciated the doctrine that the remedy of a person who is damaged by the exercise of a governmental authority of the power of eminent domain is an action to assess damages for such taking; an action in equity to enjoin the taking cannot be maintained and cannot be prosecuted in the equity branch of the court. Lowen, Appellant, v. Shapiro, 389 Pa. 610; Creasy, Appellant v. Lawler, 389 Pa. 635.

In addition, it is significant to note that, upon a most exhaustive review of the authorities, neither counsel nor the court has found legal precedent in the United States District Court for the granting of injunctive relief where the matter involved was pending in state court proceedings. The authorities, to the contrary, have held that where condemnation proceedings are pending in a state court, the United States District Court will refuse to enjoin such proceedings. Baber v. Texas Utilities Co., 228 F. 2d 665 (5 Cir.); Collins v. Laclede Gas Co., 237 F. 2d 633 (8 Cir.).

I am satisfied that although diversity of citizenship exists between the parties, grounding jurisdiction in this court, nevertheless the United States District Court should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding. I cannot but help so conclude, especially where in the instant proceeding no action has been taken in the state jurisdiction to question the validity of the state condemnation of federal authority to interfere in state matters until state remedies have been exhausted.

An appropriate Order is entered.

ORDER

AND NOW, this 25 day of September, 1957, the motion of the County of Allegheny to dismiss the within proceeding is granted.

/s/ WALLACE S. GOURLEY, CDJ
Chief Judge

Memorandum Order.

In this action the court entered an order on the 25th day of September, 1957, in which the proceeding of action against Martin W. Wise, Inc., must basically rest on a sustainable cause of action against the County of Allegheny since Martin W. Wise, Inc., is in possession of the premises by virtue of a lease executed by the County of Allegheny in favor of Martin W. Wise, Inc. Although Defendant Wise has answered, denying the allegations of plaintiffs, the cause of action of plaintiffs against Wise can rise no higher than plaintiffs' cause of action against the County of Allegheny.

In view of the foregoing and for the reasons set forth in the opinion filed on the 25th day of September, 1957, the proceeding against Martin W. Wise, Inc., is dismissed.

/s/ WALLACE S. GOURLEY
Chief Judge

Dated: September 27, 1957.

Opinion of the Court of Appeals.

(Filed June 10, 1958)

By GOODRICH, *Circuit Judge.*

This is an appeal from a judgment for the defendant entered on a motion to dismiss an action by which the plaintiffs sought an adjudication of the propriety of an eminent domain proceeding. Since the judgment was rendered without a hearing on the facts, we take the plaintiff's allegations as true for the purpose of this appeal.

The plaintiffs, citizens of Wisconsin, own land adjacent to the Greater Pittsburgh Airport which is located in Allegheny County, Pennsylvania. On June 16, 1955, the County purported to condemn plaintiffs' land for the alleged purpose of establishing and maintaining air navigation and terminal facilities at the airport.[1] Viewers were appointed to assess compensation. The viewers reported and both the County and the plaintiffs took an appeal to the Court of Common Pleas for Allegheny County.[2] In the meantime the County had leased a part of the property condemned to Martin W. Wise, Inc., a Pennsylvania corporation engaged in general contracting, for the purpose of storing its tools and heavy equipment thereon.

On May 3, 1957, the plaintiffs brought this action in the United States District Court for the Western District of Pennsylvania suing the County of Allegheny and Martin W. Wise, Inc., federal jurisdiction being based on diversity of citizenship. The basis of the complaint is

1. The authority for condemnation for airport purposes is found in Pa. Stat. Ann. tit. 16, § 5402(c) (Purdon 1956).

2. This procedure is in accordance with *id.* §§ 5601-33.

that the land was not condemned for a public purpose and, therefore, the taking is invalid. The plaintiffs allege that at the time of the condemnation the County had not formulated a plan to utilize the property for the purposes stated and has not to the present initiated any substantial steps to implement a program with such a goal. Instead, it is claimed, the County's sole purpose was to permit the private use of the lots by Wise which, in any event, has been the only result of the taking so far. A judgment of ouster and damages is demanded. In the alternative, plaintiffs, in the district court, sought an order restraining the County from proceeding further, a reconveyance of the title of the land to the plaintiffs and a concellation of the lease to Wise. The district judge, although recognizing his jurisdiction in the case, dismissed the complaint expressing a disinclination to interfere with the state condemnation procedure.

The point which has most concerned us about this case is the manner of attacking, under Pennsylvania law, the propriety of a purported exercise of the power of eminent domain. All through the sections of the statute cited above there is a rather particularized method of appointing viewers, having them report, fixing the damages and so on. There is nothing in those sections which we can see which talks about anything but the fixing of the amount of damages. Inspection of the plaintiffs' petition in the Common Pleas Court of Allegheny County shows only a claim that the amount awarded by the viewers was inadequate. Indeed, the District Court for the Eastern District of Pennsylvania has said, "The right to condemn cannot be raised at the trial following condemnation. Such a trial is merely of a feigned issue, to determine solely the quantum of compensation." *Col-*

gate v. Philadelphia Elec. Power Co., 20 F.2d 263, 264 (E.D. Pa. 1928). *Cf. Lehigh & New England R.R. Petition*, 7 Northampton 77 (Pa. C.P. 1899).

The plaintiffs have cited a line of decisions in which an indepedent action has been maintained to test the validity of condemnation proceedings. We find the cases to be in point. *Spann v. Joint Board of School Directors*, 381 Pa. 338, 113 A.2d 281 (1955); *Colove v. Borough of Robesonia*, 364 Pa. 626, 73 A.2d 679 (1950); *Pioneer Coal Co. v. Cherrytree and D. R. R.* 272 Pa. 43, 116 Atl. 45 (1922); *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487 (1913); *Vinton Colliery Co. v. Blacklick & Y.C.R.R.*, 226 Pa. 131, 75 Atl. 185 (1910); *Caruthers v. Peoples Natural Gas Co.*, 155 Pa. Super. 332, 38 A.2d 713 (1944); *C. P. Struse & Sons, Inc. v. Reading Co.*, 12 Pa. D. & C. 465 (Phila. Co. C. P. 1929); *Youghiogheny River Coal Co. v. Robertson*, 1 Pa. Dist. 809 (Alleg. Co. C. P. 1892). A statutory foundation for the procedure followed in these cases may be found in PA. STAT. ANN. tit. 12, § 1315 (Purdon 1953).

These authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that in which compensation is awarded. We think an equal jurisdiction lies in the federal district court assuming that the required diversity exists as it does here. See *Madisonville Traction Co. v. St. Bernard Mining Co.*, 196 U.S. 239 (1905). We do not find merit in any of the arguments presented by the County for not accepting that jurisdiction.

In the first place there is no conflict here with 28 U.S.C. § 2283. That section has to do with "injunctions

to stay proceedings in a State court." However, plaintiffs do not press before us their alternative theory of relief in the nature of a restraining order. They do stress their remedies at law, especially ejectment, which do not have the same preventive effect on the state court proceedings.

Moreover, since the question involved before the federal court need not, and perhaps cannot, be raised in the pending state action; the exercise of diversity jurisdiction here will not directly interfere with the Common Pleas Court's handling of its case. True, if the plaintiffs are successful in attacking the validity of the purported condemnation, there will no longer be a need for an adjudication of damages, because there will be no damages. But that is nothing more than would occur as a result of taking the same steps in a state court. Furthermore, we see no inconsistency in the plaintiffs complaining about the amount of damages awarded by the viewers in the Common Pleas court in Pittsburgh and at the same time attacking, in a separate federal proceeding, the legality of what the County has done.

The fact that the plaintiffs waited two and a half years after the resolution of condemnation before attacking its legality does not, of itself, bar them from relief because of laches. It seems to us to make the case stronger because they waited a time to see what use the County was either making or planning to make of the land.

Our conclusion is that the federal court has jurisdiction to entertain the suit brought in this case and

the plaintiffs are entitled to a trial on their allegations of fact.

The judgment of the district court will be reversed and the case remanded for further proceedings not inconsistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Order.

(No. 12,434)

On Appeal From

THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, MCLAUGHLIN and STALEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:

IDA O. CRESKOFF

June 10, 1958 Clerk

Appendix A—Order.

Order.

(No. 12,435)

On Appeal From
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GOODRICH, MCLAUGHLIN and STALEY,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, with costs, and the case remanded for further proceedings not inconsistent with the opinion of this Court.

Attest:

IDA O. CRESKOFF
Clerk

June 10, 1958

Opinion Sur Petition for Rehearing.

Before: GOODRICH, MCLAUGHLIN and STALEY, Circuit Judges.

Counsel for Allegheny County have based their petition for rehearing largely on a decision by the Supreme Court of Pennsylvania on June 3, 1958, in the case of *Gardner v. County of Allegheny*. The Court has examined that decision with great care and is unanimously of the conclusion that it does not control or even assist in the decision of this case. The petition for rehearing is, therefore, denied.

BY THE COURT,

GOODRICH
Circuit Judge

July 10, 1958

Order.

Present: GOODRICH, MCLAUGHLIN and STALEY, Circuit Judges

After due consideration the petition for rehearing in the above-entitled case is hereby denied.

Attest:

HARRIET G. HUMPHREYS
Chief Deputy Clerk

Dated:
July 10, 1958

APPENDIX B

State Statutes.

Pertinent provisions of the Second Class County Code, Act of July 28, 1953, P. L. 73, found in Purdon's Pa. Stat. Ann. Title 16, are as follows:

(Article XXIV of the Code)

Section 5402. County may hold or acquire lands for air navigation and terminal facilities.

(c) The county may acquire by gift, lease, purchase, or condemnation proceedings any land lying within its territorial limits or the territorial limits of any adjoining county which, in the judgment of the county commissioners, may be necessary and desirable for the purpose of establishing and maintaining air navigation and terminal facilities or of enlarging them, but no such land shall be so acquired in any adjoining county without the assent of the county commissioners thereof.

Section 5403. Condemnation proceedings; title

The proceedings for the condemnation of lands under the provisions of this article and for the assessment of damages for property taken, injured or destroyed shall be conducted in the same manner as provided under article XXVI.

The title acquired by virtue of any such condemnation shall be a title in fee simple.

(Article XXVI of the Code)

Section 5608. Appointment of viewers.

(a) In case the board of commissioners or a majority of them and the parties interested in the land,

property or material appropriated, injured or destroyed by the county fail to agree upon the compensation to be made for the land, property or material so taken, injured or destroyed, upon petition of such commissioners or a majority of them or any person or parties interested and whose land, property or material is affected thereby to the court of common pleas of said county, the said court shall appoint three viewers from the county board of viewers, and appoint a time, not less than twenty nor more than thirty days thereafter, when said viewers shall meet and view the land, property or material to be so appropriated, injured or destroyed.

Section 5613. Proceedings by and before viewers.

The said viewers, having been duly sworn or affirmed faithfully, justly and impartially to decide and true report to make concerning all matters and things to be submitted to them and in relation to which they are authorized to inquire and having viewed the premises and examined the land, property or material to be appropriated, injured or destroyed, shall hear all parties interested and their witnesses, and, having a due regard to and making just allowance for the advantages which may have resulted or which may seem likely to result to the owner or owners of said lands or materials in consequence of the proposed improvement, shall estimate, determine and assess the damages for the land, property or material taken, injured or destroyed, and to whom the same is payable, and the benefits, if any, in connection therewith. Having so estimated, determined and assessed the damages and benefits, they shall prepare a schedule thereof, and give notice to all parties to whom damages are allowed or against whom benefits are assess-

ed of a time, not less than ten days thereafter, and of a place, where said viewers shall meet and exhibit said schedule and hear all exceptions thereto and evidence.

Section 5616. Report to court.

After making whatever changes are deemed necessary, the said viewers shall make report to the court showing the damages allowed and benefits assessed in each case, and file therewith a plan showing the improvement and the land, properties and materials taken, injured or destroyed. When said report is filed, notice thereof shall be given by publication once in the newspaper or newspapers in which first notices of said view were published. Said notice shall state the date of filing of the report and shall contain a schedule of the damages and benefits shown therein, and shall further state that, unless exceptions thereto are filed within thirty days from the date of filing the said report will be confirmed absolutely.

Section 5623. Exceptions to report.

Upon the report of said viewers or any two of them being filed in said court, any party interested may, within thirty days thereafter, file exceptions to the same, and the court shall have power to confirm said report, or to modify, change or otherwise correct the same, or refer the same back to the same or new viewers with like power as to their report. When said report is first filed in court, the prothonotary thereof shall mark the same "confirmed nisi", and in case no exceptions are filed thereto within said thirty days, he shall enter a decree (as of course) that said report is confirmed absolutely. Within thirty days after the confirmation, modification,

changing or correcting of said report, any interested party may appeal from said decree to the Superior Court or to the Supreme Court, as the case may be.

Section 5624. Demand for jury trial.

Within thirty days after said report is filed in court as aforesaid, such county and any party whose property is taken, injured or destroyed may appeal to the court of common pleas and demand a trial by jury according to the course of the common law. The court of common pleas shall, within thirty days, order what notices shall be given in connection with any part of said proceedings and make all such orders as it may deem requisite, and may, by rule or otherwise, prescribe the form of the pleadings. After verdict and final judgment, either party may have an appeal to the Superior Court or Supreme Court as in other cases.

OCT 7 19
JAMES R. BROWNING

IN THE

Supreme Court of the United States

NO. 347

OCTOBER TERM, 1958

COUNTY OF ALLEGHENY, Petitioner,

v:

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA, and JOSEPHINE MASHUDA, partners, Respondents. (Plaintiffs-Appellants below).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HAROLD R. SCHMIDT
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ROSE, ROSE & HOUSTON
Attorneys for Respondent

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IN THE

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NO. 347

OCTOBER TERM, 1958

COUNTY OF ALLEGHENY, Petitioner,

v.

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA, and JOSEPHINE MASHUDA, partners, Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Justices of the Supreme Court of the United States:

Respondents (hereafter "plaintiffs") Frank Mashuda Company, a partnership, and Frank Mashuda, Stanley Mashuda, Bernie Mashuda, and Josephine Mashuda, partners, respectfully oppose the Petition filed by the County of Allegheny (hereafter "the County"), originally a defendant, for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit, which, on June 10, 1958, reversed and remanded the orders of the District Court of the United States for the Western District of Pennsylvania dismissing plaintiffs' Complaint.

COUNTER-STATEMENT OF THE CASE

As the County's Statement of the Case suggests, plaintiffs instituted this action in the district court to regain possession of land which the County had first taken from them illegally (under pretense of eminent domain) and then surrendered to its co-defendant for an improper and illegal private use.

Plaintiffs' Complaint, setting forth the foregoing facts in somewhat greater detail, was dismissed by the district court on the County's motion. The facts alleged in plaintiffs' Complaint, therefore, constitute the only facts in the case. In the Court of Appeals, as now before your Honorable Court, those allegations must be accepted as true.

In view of the limited factual record, plaintiffs take exception to the County's including in its Statement of the Case (Petition, p. 6) the paragraph purporting to set forth, as fact, the extent of the interest in plaintiffs' land which the County surrendered to its co-defendant, Martin W. Wise, Inc. (hereafter "Martin Wise"). It is true that Martin Wise in its Answer did *allege* facts similar to those set forth by the County. (R. 23a). However, there is nothing in the record whatsoever, other than those bare allegations of the County's co-defendant, to justify the County's representing to your Honorable Court that those allegations should be regarded as facts. Plaintiffs have certainly not admitted their truth for purposes of this action, or for any other purpose. It is respectfully submitted that the paragraph in question was improperly included by the County in its Statement of the Case.

Plaintiffs also submit that the County, in its Statement of the Case (Petition, p. 7), has misstated the basis of the decision of the learned Court below. The County erroneously states that the Court of Appeals held that plaintiffs could not challenge the propriety of the taking within the framework of the Pennsylvania statutory viewers' proceeding. The Court below did not so hold.

Although it is submitted that such a holding would have been correct, and although it is believed the Court below would have so held had it been necessary to its disposition of the case, the fact is that the Court of Appeals held nothing more than that under Pennsylvania law a challenge to the propriety of a taking is *appropriately* (but not *necessarily*) made independently of the statutory proceeding. The County's inaccuracy in this respect, appearing as it does in the Statement of the Case[1], warrants immediate correction.

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[1] The error is repeated in argument at page 10 of Petitioner's Brief.

REASONS RELIED ON IN OPPOSITION TO THE ALLOWANCE OF THE WRIT

I. The Decision of the Court of Appeals Is in Accord With the Law of Pennsylvania.

The issue which the County seeks to have reviewed by your Honorable Court involves a narrow point of local law. The Court below framed the issue as follows:

> "The point which has most concerned us about this case is the manner of attacking, under Pennsylvania law, the propriety of a purported exercise of the power of eminent domain." 256 F. 2d 241 at 242; Appendix A to Petition, p. 5.

Plaintiffs, invoking the diversity jurisdiction of the district court, chose to challenge the propriety of this purported exercise of the power of eminent domain in the district court, in a civil action similar to a common law action of ejectment. Like any other diversity plaintiffs, they could have sued in a state court.

The County regards plaintiffs' choice of the federal forum as some sort of imposition on the district court's jurisdiction, if not actually beyond that jurisdiction. Its argument is that the propriety of the taking should, in some anomalous manner, have been challenged in the statutory viewers' proceeding designed to determine compensation. Because the County's position is (a) clearly wrong, and (b) irrelevant even if correct, your Honorable Court need not review the judgment of the learned Court below.

Reasons Relied on in Opposition to Writ.

A. *The Propriety Of A Taking Cannot Be Challenged In A Pennsylvania Viewers' Proceeding.*

The only purpose of a statutory proceeding like the one now pending between the County and plaintiffs in the Court of Common Pleas of Allegheny County is to determine the compensation which must be paid to an owner of land taken under the power of eminent domain. The propriety of the taking cannot be challenged within its framework.

The clearest judicial pronouncement on the matter, quoted by the Court below (256 F. 2d at 242; Appendix A to Petition, p. 5), is contained in an opinion of the United States District Court for the Eastern District of Pennsylvania. That Court, in *Colgate v. Philadelphia Electric Power Company*, 20 F. 2d 263 at 264 (E.D. Pa. 1928), app. dism. 276 U.S. 589, 72 L. ed. 719, stated in no uncertain terms that it was impossible to challenge the propriety of a taking either in the viewers' proceedings or in the court appeals provided for thereafter. If the contrary is true, as contended by the County, it is strange indeed that the statute contains no instruction whatsoever in regard to the procedure for determining any matter other than that of compensation, when extremely detailed instruction is provided in regard to the latter.

Furthermore, the County has been unable to cite a single instance where a viewers' proceeding was utilized as a forum for challenging the propriety of a taking. This is convincing evidence that the Board of View is not an appropriate forum.

Thus, although neither local practice nor precedent supports the County's position, the County nevertheless

persists in arguing that the propriety of the taking must be challenged within the framework of the statutory proceeding. To overcome the complete lack of authority in support of its position the County now seeks to rely upon the recent decision of the Supreme Court of Pennsylvania in *Gardner v. County of Allegheny*, 393 Pa. 120, 142 A. 2d 187 (1958), a case which the Court below expressly held not relevant to the present case. 256 F. 2d at 243; Appendix A to Petition, p. 10. It is submitted that the Court of Appeals was plainly right in so holding.

In the first place, it should be noted that the landowners in the *Gardner* case were not interested in challenging the propriety of any taking as the present plaintiffs are. All the *Gardner* plaintiffs sought was *compensation* for the deprivation of what they considered a property interest. Inasmuch as the issues in the *Gardner* case and in this case are, therefore, quite different, the County is on weak ground indeed when it relies on the *Gardner* case as evidence that the decision of the Court below in this case is not in accord with Pennsylvania law.

Furthermore, although the *Gardner* opinion does contain language to the effect that the Board of Viewers must decide all *relevant* questions of law, it is clear, as the cases relied on by the County themselves show, that the Pennsylvania court meant only that questions of law *relevant to the determination of damages* are properly decided by Boards of View.

The language relied on by the County first appeared in *Powell's Appeal*, 385 Pa. 467 at 471-72, 123 A. 2d 650 at 652 (1956). It was merely quoted in the *Gardner* opinion. The occasion for making the statement in the

Powell case arose out of a dispute between an optionor and an optionee in regard to the right to compensation for land condemned. The Pennsylvania Supreme Court held that this question, admittedly one of law, had to be decided in the first instance by the Board of Viewers. This was not, however, because it was a question of law, as such, but because it was a question of law *relevant to an award of damages*. It has never been the law of Pennsylvania, as suggested by the County, that all legal questions having anything remotely to do with the power of eminent domain must be passed upon by Board of View, subject only to review by the courts.

In the *Gardner* case itself, the unsual fact situation created a legal question which the Court directed should be decided by a Board of Viewers in the first instance. Again, however, it is clear that the legal question was remanded to the Viewers, not because it was a legal question as such, but because it was a legal question *relevant to an award of damages*.

Plaintiffs concede that the Board of Viewers must first find that there has been a *taking* before it can award damages. If necessary, as in the *Gardner* case, the Board will decide questions of law *relevant to that prior determination*, which is, in turn, directly relevant to making an award of damages.

However, unlike the legal issues remanded to the Boards of View in the *Powell* and *Gardner* cases, the issue here—namely the *propriety* of the taking—is not relevant in making an award of damages. The County has asserted that the jurisdiction of the Board of Viewers to award damages somehow depends on the propriety

of the taking. In its Brief (Petition, p. 17) it states as follows:

> "As the Pennsylvania Supreme Court stated, before assessing damages, the Board of Viewers must first find there has been a taking. *This, of course must be a proper taking, otherwise there is no power to award damages.*" (Emphasis added)

The County's conclusion, emphasized above, is erroneous. The Board's power to award damages depends only on the *fact* of taking. The propriety or impropriety of the taking is beside the point and not in issue. If the owner of land illegally taken chooses to accept compensation in return for his land and to ignore the illegality of the taking, the illegal condemnor can scarcely complain. 6 *Nichols On Eminent Domain*, § 28.3 [1], p. 397 (3rd ed. 1953).

Indeed, that the County's position is erroneous is conclusively demonstrated by reference to the rule of law that a taking is invalid unless the land is put to a public use reasonably soon after the taking.[2] This is, of course, one reason why the taking here challenged is invalid. As the Court below observed, plaintiffs waited two and one-half years after the taking to see what use would be made of the land before suing at all. If the compensation proceeding had been disposed of promptly, plaintiffs would never have been able to raise the question if an independent proceeding were not available to them. Thus, the County's contention that *all* legal questions related to eminent domain must be raised before the Viewers is patently incorrect.

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[2] See, e.g., 2 *Nichols On Eminent Domain*, § 7.1 [4], p. 429 (3rd ed. 1953).

Since even the *Gardner* case limits the Board of Viewers to a determination of legal questions *relevant* to making an award of damages, the only conclusion possible is that the *Gardner* opinion, if helpful at all as an indication of the proper forum for determining the issue raised in this action, aids plaintiffs and not the County.

B. *Pennsylvania Law Clearly Allows The Propriety Of A Taking To Be Challenged Outside The Viewers' Proceeding.*

Because plaintiffs' right to challenge the propriety of the taking independently of the viewers' proceeding is so well established, the Court below wisely refrained from deciding whether or not the issue might also have been raised within the viewers' proceeding as contended by the County.

The Pennsylvania Courts have uniformly held that the propriety of an act of eminent domain is properly challenged independently of the viewers' proceeding. *Spann v. Joint Board of School Directors*, 381 Pa. 338, 113 A. 2d 281 (1955); *Colove v. Borough of Robesonia*, 364 Pa. 626, 73 A. 2d 679 (1950); *Caruthers v. Peoples Natural Gas Company*, 155 Pa. Super. 332, 38 A. 2d 713 (1944); *Dexter v. Pennsylvania Power Company*, 127 Pa. Super. 419, 193 Atl. 194 (1937); *Pioneer Coal Co. v. Cherry Tree and D.R.R. Co.*, 272 Pa. 43, 116 Atl. 45 (1922); *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305; 88 Atl. 487 (1913) (see particularly page 311 of 241 Pa.); *Vinton Colliery Co. v. Black Lick and Yellow Creek R. R. Co.*, 226 Pa. 131, 75 Atl. 185 (1910); *C. P. Spruse & Sons, Inc. v. Reading Co.*, 12 D. & C. 465 (C. P.

Phila. Co. 1929); *Wheeling, P. & B. R. Co. v. Warrell*, 122 Pa. 613, 16 Atl. 20 (1888); and *Philadelphia, Newtown & New York R. Co. v. Cooper*, 105 Pa. 239 (1884); see also *Colgate v. Philadelphia Power Co.*, 20 F. 2d 263 (E.D.Pa. 1927), app. dism. 276 U.S. 589, 72 L. Ed. 719 (1928):

> The challenge can take the form of either a bill in equity or an action in ejectment, if, as in the present case, the unlawful entry has already occurred.[3]

Except for *Wheeling, P. & B. R. Co. v. Warrell, supra*, which had not been found at the time of argument below (and was, therefore, not cited to the Court of Appeals), the Court below expressly found the above cases to be in point. It concluded as follows:

> "These authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that in which compensation is awarded. We think an equal jurisdiction lies in the federal district court assuming that the required diversity exists as it does here." 243 F. 2d at 243; Appendix A to Petition, p. 6.

It is submitted that the conclusion of the Court of Appeals is plainly correct. A group of federal court decisions on a similar point presents a perfect analogy in support of that Court's conclusion. In the administration of decedents' estates it is firmly established that strict matters of probate must be taken care of in the

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[3] This is in accord with the law in most American jurisdictions. 6 *Nichols on Eminent Domain*, §28.3 [1], pp. 393-97 (3rd ed. 1953) contains a helpful discussion and cites many cases.

state courts in accordance with the procedure there provided. Diversity of citizenship is irrelevant. However, it is equally well settled that when a person claiming assets which a state probate court has turned over to an executor or administrator has citizenship diverse from that of the adverse personal representative, his claim may be prosecuted in the federal courts, if it could be presented in the state courts independently of the probate proceeding. *Waterman v. Canal-Louisiana Bank & Trust Company,* 215 U.S. 33, 54 L.ed. 80 (1909); *McClellan v. Carland,* 217 U.S. 268, 54 L.ed. 762 (1910); *Fakouri v. Cadais,* 147 F. 2d 667 (5th Cir. 1945); *Blacker v. Thatcher,* 145 F. 2d 255 (9th Cir. 1944), cert. den. 324 U.S. 848, 89 L.ed. 1409.

It will be recalled that the Court below held only that under Pennsylvania law it was *appropriate* for plaintiffs to challenge the propriety of the taking independently of the viewers' proceeding. The cases cited in the preceding paragraph compel the conclusion that since the attack here made on the propriety of the taking may, under Pennsylvania law, be independent of the viewers' proceeding, it may appropriately be made in a federal district court when, as here, there is diversity of citizenship. The Court below decided no more.

The County, it should be noted, has not challenged the correctness of this *decision* of the Court below.[4]

If the County has proved anything, it is only that plaintiffs had the *choice* of challenging the propriety

[4] In fact, the County conceded in its Brief below that a state court action independent of the viewers' proceeding would be appropriate to challenge the propriety of the taking. Appellee's Brief, p. 17.

of the taking either within the framework of the viewers' proceeding or by instituting this independent action. Apparently plaintiffs' choice did not coincide with that of the County. But that cannot affect or detract from the district court's diversity jurisdiction. It may be speculated, in fact, that the County's insistence on a state forum in the litigation is strong evidence of the Constitutional draftsmen's wisdom in providing for federal diversity jurisdiction in the first place.

It is submitted that the decision of the Court of Appeals for the Third Circuit is fully in accord with Pennsylvania law. The only conflict the County has even suggested is in regard to a collateral issue not necessary to the disposition of this case, and not even passed upon by the Court below, that is, whether or not the propriety of the taking might also have been challenged in the viewers' proceeding.

II. The Decision of the Court Below Is Not in Conflict With the Decision of Any Other Court of Appeals.

The County seeks to invoke the discretionary jurisdiction of your Honorable Court by asserting (Petition, pp. 9-11) that the decision below conflicts with prior decisions of the Fifth and Eighth Circuits in *Baber v. Texas Utilities Company*, 228 F. 2d 665 (5th Cir. 1956) and *Collins v. LaClede Gas Company*, 237 F. 2d 623 (8th Cir. 1956), cert. den. 352 U.S. 1025, 1 L. ed. 2d 597.

But the County has admitted that what is involved here is a question of the "interpretation of state law" (Petition, p. 19). Therefore, there is no possibility of conflict with the decisions of other Courts of Appeals which were concerned *not* with the law of *Pennsylvania*

but with the law of *Texas* (in the *Baber* case) and *Missouri* (in the *Collins* case).

The County's argument on this point amounts to no more than the irrelevant assertion that the law governing eminent domain in Pennsylvania differs from its counterparts in Texas and Missouri.[5] That may be so.

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[5] Even a cursory glance at the statutory law of Texas, which underlay the decision in the *Baber* case, indicates clearly that Texas procedure is, in fact, very different from that in Pennsylvania. Unlike the practice in Pennsylvania, where the property is effectively "taken" merely by resolution of the condemning authority and without the necessity of any court proceedings at all, under the Texas statute the condemnor has no rights whatsoever in the desired land without judicial proceedings. The statute requires that the exercise of eminent domain be commenced by filing a petition for condemnation in the proper county court. Among the matters necessarily alleged by the would-be condemnor, according to the statute, is "the purpose for which [the land] is intended to be used". 52 Vernon's Ann. Civ. Stat., Art. 3264, Sec. 1. See *King v. Harris County Flood Control District*, 210 S.W. 2d 438 (Civ. App. 1948). Thus, the question of the propriety of the intended use is squarely before the court under Texas practice which is, in this respect, obviously different from that under the Pennsylvania acts set forth in Appendix B to the County's petition.

The practice in Missouri, as indicated by the *Collins* case, appears similar to the Texas practice. Furthermore, prior to the federal court proceedings in the *Collins* litigation, an administrative agency as well as the Supreme Court of Missouri, not only had had presented to them the question of the propriety of the condemnation but had in fact held the taking to be proper. Therefore, quite apart from jurisdictional considerations, the propriety of the taking was apparently *res judicata* in the *Collins* case.

But it is not the sort of conflict which has in the past commended itself to your Honorable Court as sufficient reason for granting certiorari. *Ruhlin v. New York Life Insurance Company*, 304 U.S. 202, 82 L. ed. 1290 (1938).

III. There Is No Reason to Postpone a Trial on the Merits to Await a State Court Decision on Any Issue Involved in This Case.

A. *No Constitutional Issue Is Involved.*

This Court has long applied the rule that if a case can be disposed of without passing on a potential constitutional issue it will be so disposed of.

A well-established corollary of that principal requires that when a state statute is challenged as violating the federal Constitution the federal courts will, if possible, await a definitive construction of that state law by the state courts before deciding the constitutional issue. The state court construction may remove the federal constitutional question altogether. It was this latter doctrine that was applied recently by your Honorable Court in *Leiter Minerals, Inc. v. United States*, 352 U. S. 220 at 228-29, 1 L. ed. 2d 267 at 275 (1957) and by the District Court for the Western District of Pennsylvania in *Creasy v. Stevens*, 160 F. Supp. 404 (1958) petition for cert. pending sub nom. *Stevens v. Creasy*, ... Oct. Term, 1958.

Inasmuch as the present case involves no attack on the constitutionality of any state legislation, the doctrine relied on by the County cannot apply.

In fact, the County indicates that it misunderstands the doctrine by its failure even to suggest that the constitutionality of any state law is challenged in this case.

Even if there were a collateral issue in this case involving the constitutionality of a Pennsylvania statute, it is to be remembered that this is a diversity case. When diversity of citizenship is the basis of federal jurisdiction it often happens that a district court must decide difficult questions of state law. However, it is nevertheless the federal court's duty to make such decisions and the parties are not to be remanded to the state courts merely because that would be more convenient for the federal court. *Meredith v. Winter Haven*, 320 U.S. 228, 88 L. ed. 9 (1943).

It is submitted that what the County really desires in this litigation is to have the local courts of Allegheny County determine the merits, that is whether or not Allegheny County illegally condemned property owned by citizens of Wisconsin. But that is precisely the type of case which Article III of the federal Constitution and 28 U.S.C. § 1332 permit plaintiffs to litigate in the federal courts if they so desire.

The only other question which the County has suggested should be remitted to the Pennsylvania courts is whether or not a Board of Viewers has jurisdiction under Pennsylvania law to determine the propriety of an act of eminent domain. But, as has been shown, that is an artificial question. As the Pennsylvania authorities show conclusively, and as the Court below held, even if the Board of Viewers could decide the question of the taking's propriety—for which proposition there is not a shred of statutory or judicial evidence—that jurisdiction would be no more than concurrent with that of any other proper tribunal including the district court. Therefore, to await a Pennsylvania court decision on this col-

lateral issue would mean postponing a trial on the merits to await a state court decision that cannot affect the case.

B. *The Potential Res Judicata Effect Of A District Court Judgment Is No Reason For Postponing A Trial On The Merits.*

At page 20 of its Petition, the County asserts that this Court should review the decision of the Court below because of the "confusion" which may result if the District Court decides this case on the merits in favor of plaintiffs. It refers to the "delicate question of . . . res judicata".

Plaintiffs concede that a decision on the merits in their favor will have the effect of res judicata and that the viewers' proceeding in the Court of Common Pleas will appropriately be dismissed. But the fact that a judgment will have effect has never before been suggested as sufficient reason for declining to enter it. As the Court below pointed out, a judgment for plaintiffs in the district court will have no different effect than the judgment of a Pennsylvania court had plaintiffs brought this action there.

C. *Neither 28 U.S.C. § 2283 Nor Related Principles Of Comity Are Relevant.*

28 U.S.C. § 2283 prohibits federal courts from enjoining state court proceedings except in enumerated circumstances. It does not apply here because this is not an injunction case. The relief primarily sought is a judgment of ouster and damages. These are purely "legal" remedies, which, as the Court below held, "do not

have the same preventive effect on the state court proceedings [as an injunction]." 256 F.2d at 243; Appendix A to Petition, p. 7.

In any case the County's argument based on Section 2283 is premature. The district court has not granted an injunction. It is submitted that this Honorable Court should not assume that one will be granted. Following a trial on the merits it may be that injunctive relief will be properly available under one of the exceptions written into the statute. Certiorari should not be granted here merely because of the County's speculation that the district court may, in the future, grant a prohibited injunction.

In any event, granting the legal relief requested will not interfere with the Court of Common Pleas of Allegheny County in any manner forbidden either by the statute or by principles of comity.

If the Court of Common Pleas wishes to conclude the viewers' proceedings, knowing that they may be rendered retroactively moot by a judgment in favor of plaintiffs in this action, it is free to do so. The point is, that for the district court to enter a judgment on the merits for plaintiff in this action will not involve either directly enjoining the state court proceeding or anything which has the indirect effect of an injunction.

IV. This Case Involves No Important or Difficult Question of Federal-State Relations.

The County has admitted (Petition, p. 14) that "what is involved in the instant case is simply the propriety of a taking under a state statute. . . ."

From the County's own statement, then, it correctly appears that the merits of this case involve nothing more than the determination of a question of fact: did or did not the County take plaintiffs' land illegally? So far as the merits are concerned it is obvious that no question of public importance is involved.

Furthermore, the question of whether or not a statutory Board of Viewers has jurisdiction concurrent with the courts, under Pennsylvania law, to decide if a taking is proper is not of widespread significance. Since a decision in favor of that jurisdiction would only affect Pennsylvania practice in any event, and would only mean that plaintiffs had a choice of forums, it is clear that a review of the question by your Honorable Court would be merely academic and is, therefore, not warranted.

CONCLUSION

The Court of Appeals has decided, fully in accord with Pennsylvania law, that plaintiffs are entitled to challenge the propriety of the County's purported condemnation independently of the viewers' proceeding pending in the state court. It further held that because of the parties' diverse citizenship this independent action is as properly maintained in the district court as in some state court. It is respectfully submitted that the decision of the Court below was correct and that the County's Petition for certiorari should be denied.

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IN THE

Supreme Court of the United States

NO. 347

OCTOBER TERM, 1958

COUNTY OF ALLEGHENY, Petitioner,

v.

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SUPPLEMENT TO PETITION AND APPENDIX

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SUPPLEMENT TO PETITION FOR A WRIT OF CERTIORARI

Petitioner recognizes that the rules of your Honorable Court are silent on the filing of supplements in support of a Petition for Writ of Certiorari. However, petitioner believes that there should be brought to the attention of your Honorable Court a decision and opinion of the Circuit Court of Appeals for the Second Circuit, not yet officially reported, which is in direct conflict with the decision of the Third Circut in the present case. A Petition for Certiorari has been filed with your Honorable Court in that case which raises the same point raised in the petition for writ filed by the petitioner herein and which demonstrates, from still another Circuit, the unanimous disagreement of other Circuit Courts with the decision of the Third Circuit in the present case.

The case to which your petitioner refers above is presently before your Honorable Court at No. 331 October Term, 1958, on a petition for certiorari *sub nom Charles T. Prouty, et al. v. Citizens Utilities Company.*

The opinion and order of the Circuit Court of Appeals for the Second Circuit (July 3, 1958) in that case are so diametrically opposed to the opinion and order of the Circuit Court of Appeals for the Third Circuit in the instant case, not only as to the effect of 28 U.S.C.A. § 2283 but also generally as to the relations between federal and state courts in condemnation proceedings, that only a decision of your Honorable Court can resolve the conflict. It should also be noted that the opinion of the Second Circuit in the *Prouty* case also cites a conflict in still another Circuit, the Sixth, that is the case of *National Quarries Co. v. Detroit T. & I. R. Co.*, 10 F.2d 139, 140 (6 Cir.) cited on Page 7 of the Appendix. Both cases are contra to the Third Circuit's opinion in the present case.

Your petitioner stated in the original Petition that one of the reasons that your Honorable Court should grant the Petition for Writ of Certiorari was to set aside conflict in a field so important as one of jurisdiction in matters of condemnation. At present, in addition to the conflict between the Third Circuit on the one hand and the Fifth, Sixth and Eighth Circuits on the other, there is now the headon conflict between the Third and Second Circuits. Furthermore, confusion has been multiplied. The District Court in the Third Circuit has been reversed for stating what the Second Circuit says is clearly the law in reversing its District Court.

Conclusion

WHEREFORE, it is again respectfully submitted that petitioner's application for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Third Circuit should be granted.

COUNTY OF ALLEGHENY

By MAURICE LOUIK
County Solicitor;

FRANCIS A. BARRY,
First Assistant County Solicitor;

PHILIP BASKIN,
Special Counsel.

October, 1958

APPENDIX C

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY, Plaintiffs-Appellees,

v.

CITIZENS UTILITIES COMPANY, Defendant-Appellant.

Before: SWAN, HINCKS and MOORE, Circuit Judges.

Appeal from the United States District Court for the District of Vermont, Ernest W. Gibson, Judge.

Reversed.

Opinion of the United States Court of Appeals

SWAN, Circuit Judge:

This is an appeal by defendant from a judgment for plaintiffs in a suit for specific performance of a contract to buy land located in the City of Newport, Vermont. Federal jurisdiction was based on diversity of citizenship between the respective parties. The defendant, a public utility corporation supplying electric power locally and in interstate and foreign commerce, was in possession of the property under a 25 year lease made in 1930 between the plaintiffs' predecessor in title, as lessor, and the defendant's predecessor, as lessee. The lease provided that it should enure to the benefit of, and be binding upon, the heirs, successors and assigns of the respective parties. By the terms of the lease the defendant was obligated to buy, and the plaintiffs to sell, the leased property within six months after the termination of the

lease on October 1, 1955, at a price to be agreed upon, or failing agreement, at a price to be determined by condemnation proceedings to be instituted by the defendant within said six months period "before the tribunal then having jurisdiction of such proceedings." If such proceedings were not instituted, the price to be paid for the property was $300,000. No agreement as to price having been reached, the defendant, on March 27, 1956, filed a timely petition for condemnation with the Vermont Public Service Commission pursuant to sections 9331-9333 of Vermont Statutes, Revision of 1947. The plaintiffs were named as defendants to this petition which is still pending, and no action upon it has been taken by the Vermont Commission.

On May 11, 1956, the plaintiffs brought the present suit for specific performance of their contract with the defendant. The property involved is located astride the Clyde River, which is a principal tributary of Lake Memphremagog. The only issue of fact in dispute was whether the Clyde River was a navigable stream. An advisory jury returned a verdict that the river was a navigable stream within the meaning of the Federal Power Act, Chapter 12 of Title 16 U. S. C. A. Judge Gibson approved the jury's verdict. He found also, as admitted by the pleadings in the federal suit, that the defendant had not applied for or obtained from the Federal Power Commission a license for constructing, operating and maintaining its facilities along, over, or in the Clyde River, and had not filed with the Federal Power Commission a declaration of its intention to construct such facilities, pursuant to §23 of the Federal Power Act, 16 U. S. C. A. §817. Because of these findings the trial judge held that Vermont Public Service

Commission was without jurisdiction to hear and determine the petition for condemnation pending before it, and consequently the defendant had defaulted under its contract and was obligated to purchase the property at the price of $300,000. The decree appealed from so directed.[1] Judge Gibson's opinion is reported in 150 F. Supp. 892.

The opinion of the district court and the briefs of the parties in this court have taken a much wider range than we think necessary for disposition of the appeal. In our view the decision can rest on a principle of narrow compass. Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other.[2] The petition for condemnation was a suit *in rem,* where the state tribunal must control the property to give effect to its jurisdiction.[3] Obviously, the federal court could not decree specific performance of defendant's contract to buy the land without violating the above mentioned principle of cooperation between state and federal tribunals. Although the district court did not grant the requested injunction against prosecution of the condemnation petition, its decree was as effective an interference with that proceeding as an in-

1. The complaint also prayed for an injunction to restrain the defendant from prosecuting its condemnation proceeding. Since the decree for specific performance was dispositive of the case, the requested injunction was denied.

2. *United States v. Bank of New York & Trust Co.* 296 U. S. 463, 477; *Princess Lida, etc. v. Thompson,* 305 U. S. 456, 466; *Mandeville v. Canterbury,* 318 U. S. 47, 48.

3. *United States v. 625.91 Acres of Land, etc.* (D. C. Mo.), 49 F. Supp. 997, 1000.

junction would have been. The granting of such an injunction is prohibited by 28 U. S. C. A. §2285. See *National Quarries Co. v. Detroit T. & I. R. Co.*, 6 Cir., 10 F. 2d 139, 140. There a bill in the federal court to enjoin the defendant's prosecution of a state suit to condemn land was dismissed.

Any objection which the plaintiffs wished to make to jurisdiction of the state tribunal could have been as effectively urged before it as in the federal court, and its decision could have been reviewed as provided in the Vermont statutes, and ultimately, if a federal question were involved, by the Supreme Court of the United States. We think the court below erred in holding that the Public Service Commission lacked jurisdiction. That was an issue for that tribunal to decide for itself subject to review as above stated.

Accordingly the decision on appeal is reversed; but we do not direct that the federal suit be dismissed because, if the question of jurisdiction should ultimately be decided in the appellees' favor, the pendency of the federal suit will prevent the running of any statute of limitations.

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RESPONDENTS' REPLY TO SUPPLEMENTAL PETITION FOR CERTIORARI

The County of Allegheny (hereafter "the County"), Petitioner herein, has called to the attention of your Honorable Court the case of *Prouty v. Citizens Utilities Company*, decided by the Court of Appeals for the Second Circuit in July, 1958, and in regard to which a petition for certiorari is pending in this Court at No. 331 October Term, 1958. The County attempts to show that the *Prouty* decision is in conflict with the holding of the court below in this case, and that therefore your Honorable Court should exercise its discretionary jurisdiction to resolve the conflict.

It is submitted that there is no possibility of such a conflict between the two decisions as would warrant the grant of certiorari.

Federal jurisdiction in each case was based on diversity of citizenship. The outcome in the *Prouty* case

depended on the proper application of Vermont law. The outcome in this case depended on the proper application of Pennsylvania law. Any "conflict" which may exist is not between the decisions of the two Courts of Appeals but between the statutory law of Vermont and Pennsylvania. This is not the sort of conflict which has in the past commended itself to your Honorable Court as a reason for granting certiorari. *Kuhlin v. New York Life Insurance Company*, 304 U.S. 202, 82 L. ed. 1290 (1938).

Even if there did exist the sort of conflict which is customarily an adequate ground for granting certiorari, the two cases are plainly distinguishable.

Under Vermont law, a condemnation proceeding by a public utility company constitutes a proceeding *in rem*. It is a well established rule that when one court has assumed jurisdiction over a *res*, which it will have to award to one party or another, no other court, state or federal, will undertake to enter a judgment which might be incompatible with the disposition ultimately made by the court first assuming jurisdiction. The Court of Appeals for the Second Circuit merely applied this rule in the *Prouty* case.

Condemnation proceedings in Pennsylvania, however, have no "in rem" aspect. Land is effectively "taken" by a mere resolution so stating. No court proceedings are necessary. *Philadelphia Appeal*, 364 Pa. 71, 70 A. 2d 847 (1950); *Hunter v. McKlveen*, 353 Pa. 357 at 362, 45 A. 2d 222 at 224 (1946). The Board of Viewers in the first instance, and the Pennsylvania courts thereafter, are concerned only with awarding damages and are never called upon to make an award of the land itself. The right to damages is purely personal.

It accrues to the person who is the owner of the land at the time of the resolution taking it. See *Lakewood Memorial Gardens Appeal*, 381 Pa. 46 at 54, 112 A. 2d 135 (1955). Such an owner has a vested right to money damages of which the condemning authority cannot deprive him without his consent. *Philadelphia Appeal, supra.* Nor does the right to compensation pass with title to the land if title is conveyed following the taking. *Kaufmann v. Pittsburgh*, 248 Pa. 41 at 46, 93 Atl. 779 (1915). The land itself is never under the jurisdiction of a Pennsylvania condemnation tribunal.

In Vermont the would-be condemnor has no right to possession or ownership without an order of the Public Service Commission awarding it such rights. See Vermont Rev. Stat., §§ 9332 and 9333 (1947).

Condemnation proceedings in most states apparently have an *in rem* aspect.[1] In Pennsylvania they do not. The propriety of the taking and the subsequent award of the *res* to one of the parties are matters which, in Pennsylvania, are left to be determined by an independent action if the landowner desires to litigate them.

The County has not even attempted to show that the Court of Common Pleas for Allegheny County has

---

1. In *United State v. 625.91 Acres of Land*, 49 F. Supp. 997 at 1000 (E.D. Mo. 1943), the district court clearly indicated that condemnation proceedings are "*in rem*" only insofar as they determine the propriety of the taking and make an award of the land. The Second Circuit in the *Prouty* opinion cited this case to show that in most states, unlike Pennsylvania, these *in rem* issues are an integral part of the condemnation proceedings. Appendix C to the County's Supplemental Petition, p.6, n.3.

jurisdiction over the *land* which Respondents seek to regain in this action. In the absence of such a showing the County cannot rely on decisions such as *Prouty v. Citizens Utilities Company* where the pendency of an *in rem* proceeding in another court is the reason for the decision.

Furthermore, although it is believed that the application of 28 U.S.C. § 2283 in the *Prouty* case was basically not correct, Respondents do not consider it essential to discuss that point here at length. Because of the essential difference between *in rem* and *in personam* proceedings, the court's remarks in regard to the statute are not applicable to this case. The decree of specific performance in the *Prouty* case necessarily interfered with the Vermont *in rem* proceeding and made it impossible for the Vermont tribunal to enter any order. Finally, it should be noted that discussion of § 2283 was unnecessary to the disposition made by the Court of Appeals for the Second Circuit in the *Prouty* case.

For the same reasons *National Quarries Co. v. Detroit T. & I. R. Co.*, 10 F. 2d 139 (6th Cir. 1926) is not in conflict with the decision of the court below.

It is respectfully submitted that certiorari should not be granted in this case.

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BRIEF FOR PETITIONER AND APPENDIX

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BRIEF FOR PETITIONER AND APPENDIX

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania (R. 26) is recorded in 154 F. Supp. 628. The opinion of the United States Court of Appeals for the Third Circuit (R. 28) is reported at 256 F. 2d 241, and the opinion of the said court in denying a petition for rehearing (R. 49) is reported at 256 F. 2d 243.

JURISDICTION

Jurisdiction to issue the writ is found in the provisions of Title 28, United States Code, Section 1254 (1).

The judgment of the United States Court of Appeals for the Third Circuit was entered on June 10, 1958. (R. 32). A petition for rehearing was denied by order entered July 10, 1958. (R. 49). The Petition for Writ of Certiorari was filed on September 8, 1958 and granted on October 27, 1958. (R. 50).

STATUTES INVOLVED

United States

28 U.S.C. § 2283, Act of June 25, 1948, c. 646, 62 Stat. 968.

"A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

Pennsylvania

16 Purdon Pa. Stat. Ann.

Secs. 5401-5408 (Second Class County Code, Act of July 28, 1953, P. L. 723, Art. XXIV, Aeronautics).

Secs. 5601-5633 (*id*, Art. XXVI, Eminent Domain and Injury to Property).

Pertinent provisions of these sections are printed in Appendix A hereof.

QUESTIONS PRESENTED

The basic issue raised by plaintiffs' complaint in the District Court is whether the County condemned their property for a lawful purpose under state law. (Plaintiffs also alleged that if the state law purported to authorize the condemnation, the law violated the state and federal constitutions.) Plaintiffs had filed their appeal in the state court from the amount of the award of the Board of Viewers, and in their appeal averred that the condemnation was proper. Almost a year after the appeal plaintiffs filed suit in the District Court to set aside the condemnation as improper without submitting their claim to the state court for that court to decide it or to determine that it has no jurisdiction to decide it. The District Court dismissed the complaint and the Court of Appeals reversed. The principal questions are:

1.

Where a local governmental unit has condemned property under its state statutory power of eminent domain and it and the property owners involved have been proceeding in a state court in accordance with state statutory procedure, does the United States District Court have any jurisdiction to entertain a suit by the property owners to set aside the condemnation on the grounds that the taking of the property is not for a public purpose under the state constitution and statutes, which question the property owners have not attempted to raise in the state court?

2.

Even if the District Court does have jurisdiction, in view of the pending proceeding in the state court

and the failure of the plaintiffs to raise in the state court any question concerning the propriety of the exercise of the state statutory power, do not principles of comity and equitable jurisdiction require that the District Court refuse to exercise its jurisdiction pending submission of that question to the state court, particularly when that question involves the determination of the procedure in, and jurisdiction of, the state court in that proceeding?

3.

Was not the determination by the Court of Appeals of the procedure in, and the jurisdiction of, a state court in state condemnation proceedings directly in conflict with Pennsylvania law?

(This was one of the reasons given by petitioner in support of its petition for certiorari. As will appear from the Argument, *infra*, the question is also directly involved with the problem of jurisdiction and with the problem of comity between the federal and state courts.)

STATEMENT OF THE CASE

Proceedings Below

On May 3, 1957, respondents (referred to as plaintiffs in this statement) filed their complaint in the District Court for the Western District of Pennsylvania, basing jurisdiction in that court on diversity of citizenship. (R. 3-7). Plaintiffs sought ouster of the defendants, the County of Allegheny and Martin W. Wise, Inc., from property previously taken from them by the County, or in the alternative, an injunction to restrain the County from proceeding further against the plaintiffs in certain condemnation proceedings pending in the Court of Common Pleas of Allegheny County and a reconveyance of the land to them. (R. 7). On May 23, 1957, the County, first named defendant, filed a motion to dismiss the complaint. (R. 7-8).[1].

On September 25, 1957, the District Court, by Gourley, C. J., entered an order dismissing plaintiffs' complaint against the County and filed an accompanying opinion. (R. 26-27). On September 27, 1957, Judge Gourley also entered an order dismissing the action as to Martin W. Wise, Inc., the second named defendant. (R. 27). From those two orders plaintiffs filed appeals to the Court of Appeals for the Third Circuit which, as set forth previously, reversed the orders of the District Court. (R. 32). The County filed a petition for rehearing (R. 33-39) which was denied (R. 49).

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1. Martin W. Wise, Inc., the second named defendant, filed an Answer (R. 14-18) asking judgment in its favor (R. 18). As a reading of the pleadings discloses, said defendant has no real interest in these proceedings, the controversy being between plaintiffs and the County.

The basis of plaintiffs' complaint is that on June 16, 1955, when their property was condemned by the County for airport purposes, the County had not formulated any definite plan for the use of the land for any public purpose, that the only plan of the County for the property was that it should be leased to the second named defendant, Martin W. Wise, Inc., for its benefit, and that condemnation for such a purpose is illegal, unconstitutional and invalid under the state and federal constitutions. (R. 3-7).

The County's motion to dismiss was based on the grounds that the plaintiffs and the County had been proceeding in the Court of Common Pleas of Allegheny County on the condemnation, that the plaintiffs had raised no question in that court, or in the preceding viewers' proceedings, concerning the illegality of the taking, and that because of the pending state court proceedings, the District Court had no jurisdiction over the subject matter involved in the plaintiffs' complaint, and further, even if it had jurisdiction, it should decline to exercise its jurisdiction pending the submission of plaintiffs' claim in the state court proceedings. The County also averred that the complaint did not set forth a cause of action. (R. 7-8).

Facts

The plaintiffs' property had been condemned by the County in accordance with state statutory procedure, under its right of eminent domain, by resolution of the Board of County Commissioners, adopted on June 16, 1955, condemning the property for use at the Greater Pittsburgh Airport owned by the County. (R. 10, par. 1.

R. 4, para. 6-7).[1] On September 22, 1955, pursuant to statutory provisions, the County filed a petition for the appointment of viewers in the Court of Common Pleas of Allegheny County (R. 13, para. 3), and on March 29, 1956, after hearing, the Board of Viewers filed their report awarding the sum of $52,644.00 to plaintiffs (R. 13, para. 4). Both the plaintiffs and County appealed to the Court of Common Pleas from that award and these appeals are pending in that court. (R. 6, para. 19). During those proceedings the plaintiffs at no time disputed the propriety of the action of the County Commissioners. In fact, the plaintiffs in their appeal from the viewers' award in the Court of Common Pleas expressly averred that the resolution of the County Commissioners was duly adopted in conformance with the provisions of the Second Class County Code. (R. 10, para. 1).

So far as Martin W. Wise, Inc. was concerned, that defendant was awarded a contract by the County for construction work at the Airport and the County permitted Martin W. Wise, Inc., to use approximately one-fourth of an acre of the eight acres formerly owned by the plaintiffs for temporary storage of construction materials and equipment during construction of concrete paving at the airport. (R. 19-25). The County

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1. Article XXIV of the Second Class County Code, 16 Purd. Stat. Ann. Secs. 5401-5408 (1956) deals with Aeronautics. In Sec. 5402 (c) is found authority for condemnation for airport purposes and Sec. 5403 provides that proceedings for condemnation shall follow the procedure in Article XXVI of the Second Class County Code, 16 Purd. Pa. Stat. Ann. Secs. 5601-5633, which deals with Eminent Domain procedure. Pertinent provisions of the above statutes are printed in Appendix A hereof.

had a right to terminate and revoke the permit at any time (R. 22, para. 10 (6)), and the permit was subject to the orders of the Administrator of Civil Aeronautics. (R. 20, para. 6).[1]

At no time have plaintiffs filed any action in the state court to question the validity of the taking.

Reasoning of the Courts Below

The District Court, in its brief opinion accompanying its order dismissing the action, stated that neither counsel nor the court had found any legal precedent for grant of plaintiffs' requested relief when the matter involved was pending in state court proceedings but that on the contrary the authorities have refused to interfere in such proceedings, citing *Baber v. Texas Utilities Co.*, 228 F. 2d 665 (5 Cir. 1956); *Collins v. La Clede Gas Co.*, 237 F. 2d 633 (8 Cir. 1956) (R. 26-27). The District Court further stated (R. 27):

> "I am satisfied that although diversity of citizenship exists between the parties, grounding jurisdiction in this Court, nevertheless, the United States District Court should not interfere with the administration of the affairs of a political subdivision acting under color of State law in a condemnation proceeding. I cannot but help so conclude, especially where in the instant proceeding, no action has been taken in the State jurisdiction to question the

1. The construction contract with Martin W. Wise, Inc. was entered into on May 22, 1956 (R. 4, para. 4; R. 16, para. Eleventh). The permit for use of temporary storage space was granted as of June 1, 1956, for a twelve-month period. (R. 4, para. 4; R. 16, para. Eleventh).

validity of the State condemnation proceeding. I must give emphasis to the disinclination of federal authority to interfere in state matters until state remedies have been exhausted."

The Court of Appeals, in its opinion, did not refer to the cases from the other circuits cited in the opinion of the District Court or to any cases concerning the applicability of 28 U.S.C. Sec. 2283. The basis of the Court of Appeal's decision was that there is nothing in the Pennsylvania statutory provisions governing the exercise of the power of eminent domain which could permit the plaintiffs to raise the question of the propriety of the taking in the proceedings now pending in the state court on appeal from the viewers' award, or in fact any question other than the determination of damages, and that since a separate proceeding was required in the state court, diversity of citizenship permitted such action in the District Court. (R. 29-31).

In its petition for rehearing (R. 33-39) petitioner stressed the jurisdictional and other problems raised by the court's decision and also pointed out that the Supreme Court of Pennsylvania had, on June 3, 1958, just one week prior to filing of the opinion of the Court of Appeals, filed an opinion in the case of *Gardner v. Allegheny County*, 393 Pa. 120, 142 A. 2d 187 (1958) (R. 40-48), which petitioner submitted was diametrically opposed to the Court of Appeal's opinion on the question of the scope of the state court's jurisdiction in eminent domain proceedings, since the Pennsylvania Supreme Court stated that questions of law as well as determinations of damages were to be decided under the statutory procedure, and specifically held that the ques-

tion of whether there was a taking in that case must be decided in the eminent domain proceeding provided by statute. The Court of Appeals, in a one paragraph opinion which stated that the *Gardner* case was inapplicable, denied the petition. (R. 49).

SUMMARY OF ARGUMENT

I

A. Since the relief requested by plaintiffs is ouster of the County from the property, or an injunction to restrain the County from proceeding further in the pending state court proceedings, the effect of the decision of the Court of Appeals in ordering the District Court to proceed with the issue of the propriety of the taking is to enjoin the proceedings in the state court. The decision, therefore, is contrary to the prohibition of 28 U.S.C. Sec. 2283, which leaves a federal court without jurisdiction to grant the relief requested, and is contrary to the decisions of your Honorable Court and of various courts of appeals in connection with the interpretation of that section.

B. Even apart from Sec. 2283, the district court has no jurisdiction in this matter because of the *in rem* nature of a condemnation proceeding. Since the issue raised by the plaintiffs concerns title and right to possession of the *res*, and not merely money damages, and since the state court had acquired jurisdiction of the parties and the *res*, the state court had exclusive jurisdiction of the issue. Even if it is assumed that the condemnation action, or the appeal from the award from the viewers, could have been removed to the federal court, failure to remove within the time allotted by fed-

eral statute subsequently leaves the district court without jurisdiction to entertain the suit.

II.

A. Even if there is jurisdiction in the District Court of plaintiffs' action, it was properly within the discretion of the District Court not to exercise its jurisdiction while awaiting determination of the plaintiff's claim in the pending state court proceeding. This self-abstention in the exercise of a court's jurisdiction avoids conflict between state and federal courts and is fully supported by principles of comity.

B. The District Court was also correct in refusing to exercise its jurisdiction because the plaintiffs' claim disclosed a lack of equitable jurisdiction. As this Court has previously stated, when equitable relief is requested it is a federal court's duty to refrain from entering upon the case when a suit is pending in the state court where the state questions can be answered, at least where the parties to the federal court action are not strangers to the state action. There is no showing of irreparable injury in this case which would require a court to exercise its equitable jurisdiction.

C. Particularly should jurisdiction not be exercised when a condemnation proceeding is pending in a state court and one of the questions to be decided is whether the state court has jurisdiction under state statue to pass on plaintiffs' claim in that action. As set forth in III, *infra,* of this Summary, the answer of the Court of Appeals to that question is contrary to Pennsylvania law. But even more important,—assuming that the Pennsylvania law is in doubt on the point relied upon by the Court of Appeals—why should the Court of

Appeals "guess" that the question of the propriety of a taking cannot be decided by the state court under state law when plaintiffs have the opportunity to have the state court itself rule on the question.

III

The decision of the Court of Appeals is directly at variance with the decision of the Supreme Court of Pennsylvania on the interpretation of state law upon which the Court of Appeals based its decision. This demonstrates the wisdom of the policy that determination of local law be left to the state courts in preference to a "guess" of that law by the federal courts. The Court of Appeals stated that the eminent domain statute under which the parties were proceeding in the state court deals *solely* with ascertainment of the amount of damages for a taking. Yet the Pennsylvania Supreme Court, in an almost simultaneous decision, has held just the opposite stating that all relevant questions of law concerning the taking, as well as determination of damages, are involved in the eminent domain proceeding, and so has the Pennsylvania Superior Court, in line with many prior appellate court decisions.

IV

If the Court lacked jurisdiction, dismissal of plaintiffs' complaint was mandatory. If the court had jurisdiction but chose not to exercise it, under the circumstances of this case, dismissal of the action was proper, it being within the District Court's discretion to stay the action if dismissal would be prejudicial to plaintiffs. There being no substantial reason for staying the action, the action was properly dismissed.

ARGUMENT

I. The District Court Had No Jurisdiction in This Case.

A. *Under 28 U. S. C. Sec. 2283, a federal court has no jurisdiction to grant the relief requested by plaintiffs.*

Section 2283 of Title 28 U. S. C. provides:

"A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its judgments. June 25, 1948, c. 646, 62 Stat. 968, 28 U. S. C. A. Sec. 2283."[1]

The statute leaves a district court without jurisdiction to grant the relief requested since that court has no jurisdiction except that conferred by Congress: *Chicot County Drainage District v. Baxter State Bank,* 308 U. S. 371, 376, 60 S. Ct. 317, 84 L. ed. 329 (1939); *West Pub. Co. v. McColgan,* 138 F. 2d 320 (9 Cir. 1943); *Williams v. Miller,* 48 F. Supp. 277 (D. C. N. D. Cal. 1942), *aff'd,* 317 U. S. 599, 63 S. Ct. 258, 87 L. ed. 489 (1942). And it is clear that section 2283 is a jurisdictional bar: *Leiter Minerals, Inc., v. United States,* 352 U. S. 220, 77 S. Ct. 287, 1 L. ed. 2d 267, *reh. den.,* 352 U. S. 1019, 77 S. Ct. 553, 1 L. ed. 2d 560 (1957).[2]

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1. The 1948 statute revised an earlier statute, March 3, 1911, c. 231, Sec. 265, 36 Stat. 1162; 28 U. S. C. 1940 ed. Sec. 279. The basic provisions go back to 1793, 1 Stat. 335.

2. See also, cases in connection with Sec. 2283 cited at page 15 *infra.*

Argument.

The provisions of Section 2283 are applicable not only to orders of a federal court directly restraining proceedings of the state court but to all orders of a federal court which necessarily have that effect: *Haines v. Carpenter*, 91 U. S. 254, 23 L. ed. 345 (1875); *Prouty v. Citizens Utilities Company*, 257 F. 2d 692 (2 Cir. 1958), *cert. den.* October 20, 1958; *Harrison v. Triplex Gold Mines, Limited*, 33 F. 2d 667 (1 Cir. 1929); *Stenger v. Stenger Broadcasting Corporation*, 28 F. Supp. 407 (D. C. M. D. Pa. 1939).

In the instant case, respondents, as plaintiffs in the District Court, sought ouster of the County from the land involved and in the alternative an injunction restraining the County from proceeding in the pending state court action and for reconveyance of the land to the plaintiffs. Therefore, for all practical purposes, this case may well be considered as a request for injunctive relief against pending state court proceedings in a matter relating to condemnation of plaintiffs' property by the County.[1] If the District Court were to grant any of the prayers for relief prayed for, the result would be suspension of the state court proceeding. In a very recent case where similar relief in a similar situation was requested, the Court of Appeals for the Second Circuit, in holding that the district court had no jurisdiction to grant the relief requested, succinctly stated:

"Although the district court did not grant the requested injunction against prosecution of the con-

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1. It is quite clear that the relief sought is not expressly authorized by Act of Congress, is not necessary to aid the jurisdiction of the District Court, or to protect or effectuate any judgment of that court. See *Leiter Minerals, Inc., v. United States, supra*, p. 13.

demnation petition, its decree was as effective an interference with that proceeding as an injunction would have been. The granting of such an injunction is prohibited by 28 U. S. C. A. Section 2283." *Prouty v. Citizens Utilities Company, supra,* at page 694 of 257 F. 2d.[1]

There have been a number of recent cases in the various courts of appeal on condemnation matters similar to that presented in the instant case in which Section 2283 was interpreted, and those cases have been decided in a manner directly contrary to the decision of the Court of Appeals below: *Prouty v. Citizens Utilities Co.*, 257 F. 2d 692 (2 Cir. 1958) *cert den.* October 20, 1958; *Baber v. Texas Utilities Company,* 228 F. 2d 665 (5 Cir. 1956); *Collins v. LaClede Gas Company,* 237 F. 2d 633 (8 Cir. 1956) *cert. den.* 352 U.S. 1025, 77 S. Ct. 591, 1 L. ed. 2d 597, *reh. den.* 353 U. S. 919, 77 S. Ct. 677, 1 L. ed. 2d 718 (1957). The same holdings are to be found in cases involving the predecessors of Section 2283: *National Quarries Co. v. Detroit, T. & I. R. Co.,* 10 F. 2d 139 (6 Cir. 1926); *Marblehead Land Co. v. Los Angeles County,* 276 Fed. 305 (D.C.S.D. Cal. 1921);[2] *Dillon v. Kansas City Suburban Belt R. R. Co.,* 43 Fed. 109 (Cir. Ct. W. D. Mo. 1890).[3]

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1. The prayer for relief was for specific performance of an agreement and/or injunction against a state agency proceeding. The district court decreed specific performance. The case is more fully discussed at page 17, *infra.*

2. Both decided under Sec. 265, Judicial Code, 36 Stat. 1162, *supra,* page 13, the immediate predecessor of Sec. 2283.

3. Decided under Rev. St. U. S., Sec. 720, which preceded Sec. 265.

The *Collins* case specifically holds that an action to enjoin condemnation proceedings in a state court because the condemnation was alleged to be unconstitutional is not within the statutory exceptions set forth in Section 2283, and the complaint in the *Collins* case is similar, if not identical, to the basis of the complaint in the instant case. In the *Baber* case, the plaintiffs also requested the district court to enjoin condemnation proceedings in the state court alleging that the state court proceedings denied plaintiffs' rights of due process under the United States Constitution. The Court of Appeals affirmed the dismissal of the action by the district court, and in support of its affirmance cited Sec. 2283 (p. 666 of 228 F. 2d). The dismissal of the action was also the result in the *National Quarries Co.* case, where plaintiffs alleged that the condemnation laws of Ohio and the proceedings then pending in the state court violated the federal Constitution. In the *Marblehead Land Co.* case, plaintiffs unsuccessfully sought in the district court to enjoin Los Angeles County from taking possession and opening a highway condemned in state court proceedings which plaintiffs alleged were unlawful. In *Dillon v. Kansas City S. B. Ry. Co.*, the court was faced with the same situation presented in the instant appeal and the court refused to enjoin the condemning railroad company from entering upon the land sought to be condemned while there was a condemnation proceeding pending in a state court, although plaintiffs alleged that they were not made parties to the condemnation proceeding and that their rights were affected.

In the *Prouty* case, while eminent domain proceedings were pending before the Vermont Public Service Commission, plaintiffs brought a suit for specific performance of a contract in the district court, which contract involved property then involved in the condemnation proceedings. The district court determined that the Vermont Public Service Commission did not have jurisdiction over the condemnation petition then before the Commission and the district court then decreed specific performance. On appeal, the Court of Appeals stated that although the district court did not grant the injunction against the condemnation proceedings in the state tribunal which was also prayed for by plaintiffs in the district court, the court's decree for specific performance was as "effective an interference with that proceeding as an injunction would have been." (694 of 257 F. 2d).

At p. 694 of 257 F. 2d, the court further stated:

"Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other.[2] The petition for condemnation was a suit *in rem*, where the state tribunal must control the property to give effect to its jurisdiction. Obviously, the federal court could not decree specific performance of defendant's contract to buy the land without violating the above

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2. United States v. Bank of New York & Trust Co., 296 U.S. 463, 477, 56 S. Ct. 343, 80 L. Ed. 331; Princess Lida, etc. v. Thompson, 305 U.S. 456, 466, 59 S. Ct. 275, 83 L. Ed. 285; Mandeville v. Canterbury, 318 U.S. 47, 63 S. Ct. 472, 87 L. Ed. 605. (Court's footnote).

mentioned principle of cooperation between state and federal tribunals."

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"Any objection which the plaintiffs wished to make to jurisdiction of the state tribunal could have been as effectively urged before it as in the federal court, and its decision could have been reviewed as provided in the Vermont statutes, and ultimately, if a federal question were involved, by the Supreme Court of the United States. We think the court below erred in holding that the Public Service Commission lacked jurisdiction. *That was an issue for that tribunal to decide for itself subject to review as above stated.*" (Emphasis supplied.)

In the instant case, lack of jurisdiction in the district court was even more obvious than in the *Prouty* case. In the instant case, there had already been a proceeding before the initial condemnation body, that is the Board of Viewers, whose decision has been appealed by the respondents in this case to the Court of Common Pleas of Allegheny County where the matter is now delayed pending the outcome of the instant case in the federal courts. Furthermore, there is no question about the jurisdiction of the state court over the parties and the *res*, as there was in the *Prouty* case.

In fact, as the District Court below recited in its opinion in the instant case there is no support in federal case law for the position of the respondents. (R. 26).[1] The cases cited by the Court of Appeals below

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1. Counsel have been unable to find a case involving Sec. 2283 or its predecessors which upholds the action of the Court of Appeals below. The case of

in its opinion have nothing to do with the question of conflict between state and federal courts and the Pennsylvania statute cited by the Court of Appeals (12 P.S. 1315, R. 30) is also inapplicable, since it relates to actions questioning powers of private corporations and not to condemnation by municipalities which are governed in Pennsylvania by specific statutes. (In the case of the County of Allegheny, by the Second Class County Code, pertinent provisions of which are printed in Appendix A hereof).

Recent leading cases of your Honorable Court supporting the conclusion that jurisdiction in the instant case is barred by Sec. 2283 are: *Leiter Minerals, Inc. v. United States, supra*, p. 13; *Amalgamated Clothing Workers of America v. Richman Brothers*, 348 U.S. 511, 75 S. Ct. 452, 99 L. ed. 600 (1955).

In the *Leiter* case, your Honorable Court reviewed the propriety of an injunction in favor of the United States against state court proceedings which had been

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Louisiana Power & Light Co. v. City of Thibodaux, 255 F. 2d 774 (5 Cir. 1958) *cert. granted* at No. 398 October Term, 1958, does not involve Section 2283 or any question concerning the jurisdiction of the court. In that case, after timely removal of state court proceedings to the district court under the federal removal statute, the district court stayed proceedings pending clarification of a state statute by the state court. The circuit court stated that this was not a case where equitable jurisdiction and discretion incident to such jurisdiction are present. The questions raised in the petition for certiorari are limited to whether the district court had discretion, as a matter of its equitable powers, to issue its order, whether it abused such discretion, and whether its order was appealable.

granted by a district court and sustained by a court of appeals. Your Honorable Court *remanded the case with instructions to stay the district court proceedings pending state court action.* The case arose out of an action filed by *Leiter Minerals, Inc.*, in a Louisiana State court against mineral lessees of the United States. Plaintiff sought to have itself declared the owner of mineral rights under land owned by the United States and also requested an accounting from the lessees. The United States was not a party to the suit. While proceedings were still pending in the state court the United States brought an action in the United States District Court for the Eastern District of Louisiana, to quiet title in the mineral rights and also sought a preliminary injunction to restrain petitioner from prosecuting its action in the state court. Your Honorable Court, although holding that the restrictions of Section 2283 did not apply to the United States, nevertheless left no doubt that such a construction would not be applicable if a private party was seeking similar relief.

". . . There is, however, a persuasive reason why the federal court's power to stay state court proceedings might have been restricted when a private party was seeking the stay but not when the United States was seeking similar relief. The statute is designed to prevent conflict between federal and state courts. This policy is much more compelling when it is the litigation of private parties which threatens to draw the two judicial systems into conflict than when it is the United States which seeks a stay to prevent threatened irreparable injury to a national interest." (225 of 352 U.S.).

". . . where questions of constitutionality are involved—and the Government contends that an *application* of the state statute adverse to its interests would be unconstitutional—our rule has been precisely the opposite: 'as questions of federal constitutional power have become more and more intertwined with preliminary doubts about local law, we have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law.'" (Citations) (228 of 352 U. S.) (Emphasis supplied).

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". . . The Supreme Court of Louisiana has never considered the specific issue or even discussed generally the rationale of the statute, especially with reference to problems of constitutionality. The District Court recognized the importance of the statute in deciding this case; it also recognized that a problem of interpretation was involved, that the statute cannot be read by him who runs. What are the situations to which the statute is applicable? Is the statute merely declaratory of prior Louisiana law? What are the problems that it was designed to meet? The answers to these questions are, or may be, relevant. Before attempting to answer them and to decide their relation to the issues in the case, *we think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court.*" (229 of 352 U.S.) (Emphasis supplied).

In the *Leiter* case injunction against the state court was prohibited *even though the United States was a*

party seeking such relief and even though the United States was not a party to the proceedings in the state court, and even though it was held that the United States is not subject to the provisions of 28 U.S.C. 2283. In the instant case, the plaintiffs are private parties and they submitted themselves to the jurisdiction of the state court in proceedings which are still pending in the state court.

So strong is the effect of Sec. 2283 that in *Amalgamated Clothing Workers of America v. Richman Brothers, supra,* your Honorable Court stated that a district court could not enjoin an action in the state court to prevent peaceful picketing despite the applicability of federal labor laws. As was stated at page 518 of 348 U.S.:

> "The prohibition of § 2283 is but continuing evidence of confidence in the state courts, reenforced by a desire to avoid direct conflicts between state and federal courts."

Even the dissenting opinions in that case would not call for a different result in the instant case. The dissents are based chiefly on the grounds that the federal government had preempted the field of labor relations involved in the case and that the jurisdiction of the federal courts in that field was not intended to be prohibited by Sec. 2283.

B. *Even apart from 28 U.S.C. Section 2283, the District Court had no jurisdiction in this matter because of the in rem nature of the pending State Court proceeding.*

Even respondents recognize that if the proceeding in the state court is an *in rem* action, the district court would have no jurisdiction. At page two of respondents' Reply to Petitioners Supplemental Petition for Writ of Certiorari, respondents state:

> "It is a well established rule that when one court has assumed jurisdiction over a *res* which it will to award to one party or another, no other court, state or federal, will undertake to enter a judgment which might be incompatible with the disposition ultimately made by the court first assuming jurisdiction."

Respondents then contended that condemnation proceedings in Pennsylvania have no *in rem* aspects.

Your Honorable Court has recognized that a condemnation proceeding is *in rem*. *United States v. Petty Motor Company*, 327 U.S. 372, 66 S. Ct. 596, 90 L. ed 729, *reh. den.*, 327 U.S. 818, 66 S. Ct. 813, 90 L. ed 1040 (1946)[1]. Significantly, the Third Circuit itself recognizes that a condemnation proceeding is *"in rem"*. *United States v. 25.936 Acres*, 153 F. 2d 277, 279 (3 Cir. 1946).

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1. In the *Leiter* case, which did not involve condemnation but did involve right to property, the court characterized the action as being *quasi in rem*. 228 of 352 U.S.

Quasi in rem and *in rem* actions both have the same effect of giving the court first having jurisdiction the exclusive jurisdiction over the res involved to the extent necessary to achieve the objective of the suit. 2 Moore, *Federal Practice*, Para. 3.06, p. 714 (2nd ed.).

This case was cited for the same proposition in *United States v. 70.39 Acres*, 164 F. Supp. 451, 486 (D.C. S.D. Cal. 1958). See also *Prouty v. Citizens Utilities Company, supra*, at p. 694 of 257 F. 2d, and *United States v. 625.91 Acres*, 49 F. Supp. 997, 1000 (D.C. E.D. Mo., 1943). A condemnation proceedings in Pennsylvania is not merely a personal action for damages but also a proceeding involving title to the property itself and any questions of law concerning said property. This is clearly disclosed in decisions of both the Supreme Court and Superior Court of Pennsylvania. *Gardner v. Allegheny County*, 393 Pa. 120, 142 A.-2d. 187 (1958); *Allentown's Appeal*, 121 Pa. Superior Ct. 352, 183 Atl. 360 (1936).[1]

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1. These and other applicable cases are discussed at length in Part III of this Argument, and they disclose that even the determination of whether there is a taking and, if so, how much, is involved in an eminent domain proceeding. E. g., the Pennsylvania Supreme Court in *Gardner v. Allegheny County*, 393 Pa. 120, 142 A. 2d 187 (1958), stated that a Board of Viewers can make a determination that there was a 'taking' of a fee simple or an easement, or that there was no taking at all. The Pennsylvania Superior Court, in *Allentown's Appeal*, at page 359 of 121 Pa. Superior Ct., p. 363 of 183 Atl. stated that the jury in an appeal from the award of the viewers must also determine the nature of the injuries before determining damages. Not only is the scope of the viewers proceedings clear from the cases cited in Part III, but it is also indicated in the eminent domain provisions of the Second Class County Code which require the viewers to determine the property *taken, injured or destroyed*. To say viewers proceedings and the subsequent appeal, if any, to the Court of Common Pleas may determine that there was no taking or only a partial taking, and then contend that the proceeding is not *in rem* because it has only to do with money damages and nothing to do with the *res*, is contradictory on its face.

Argument.

The effect of the decisions of the Court of Appeals below was to separate the question of damages from the question of title to the property in eminent domain proceedings. Not only is this contrary to the Pennsylvania law, but a similar attempt to separate the two questions in two different actions, one in a state court and one in a federal court, was rebuffed by Your Honorable Court. *Chicago, Rock Island & Pacific Railroad Co. v. Stude,* 346 U.S. 574, 74 S. Ct. 290, 98 L. ed. 317 (1953). In that case, the plaintiff railroad filed an application to condemn land and the viewers proceeding set the damages. The railroad deposited the amount of the award, took possession of the land and then in the state court filed notice of appeal from the award. The railroad then filed a petition to remove the action to the federal court and also filed a separate complaint in the federal court claiming the award of damages was excessive. The defendant filed a motion to dismiss the complaint and a motion to remand the state court proceeding to the state court. The district court dismissed the complaint and was affirmed by the court of appeals. The district court denied the motion to remand and was reversed by the court of appeals. Your Honorable Court affirmed both actions of the court of appeals. Your Honorable Court held that the remand order was proper since the railroad was the plaintiff and therefore could not remove the case. On the motion to dismiss, your Honorable Court stated, at pp. 581-582 of 346 U. S.:

> "The right to take the land and the ensuing right to damages here spring from the exercise of the power of eminent domain. The petitioner here seems to ignore the means by which it obtained the land and seeks to review only the question of damages.

> It may not separate the question of damages and try it apart from the substantive right from which the claim for damages arose. Nor can it be said that petitioner has fully exercised its power of eminent domain, leaving nothing to be determined but the question of damages."[1]

Your Honorable Court has made it clear that where a state court has jurisdiction over the parties and the res a federal court has no jurisdiction to interfere in any matter affecting the res. *Princess Lida of Thurn and Taxis v. Thompson,* 305 U.S. 456, 59 S. Ct. 275, 83 L. ed. 285 (1939). In that case your Honorable Court affirmed the order of the Pennsylvania Supreme Court[2] which affirmed an order of the Court of Common Pleas enjoining defendants in the state court from prosecuting a suit which they had filed in the district court against trustees for relief obtainable in the state court proceeding for settlement of a trustees' account.

At p. 466 of 305 U.S., your Honorable Court stated:

> "We have said that the principle applicable to both federal and state courts that the court first assuming jurisdiction over property may maintain and exercise that jurisdiction to the exclusion of the other, is not restricted to cases where property has actually been seized under judicial processes before a second suit is instituted, but applies as

1. This case, and the dissenting opinions, are discussed more fully at page 29 *infra.* The dissents viewed the case as one involving only the amount of damages for the taking.

2. *Thompson v. Fitzgerald,* 329 Pa. 497, 198 Atl. 58 (1938).

well where suits are brought to marshal assets, administer trusts or liquidate estates, and in suits of a similar nature where to give effect to its jurisdiction, the court must control the property (Citations). The doctrine is necessary to the harmonious cooperation of federal and state tribunals." (citations). "While it has no application to a case in a federal court, based on diversity of citizenship, wherein the plaintiff seeks merely an adjudication of his rights or his interest as a basis of a claim against a fund in the possession of a state court (citations), this is not such a case. No question is presented in the federal court as to the right of any person to participate in the res or as to the quantum of his interest in it. The contentions are solely as to administration and restoration of corpus."

The Pennsylvania Supreme Court simply followed the rule laid down by your Honorable Court in a long line of cases, including *Peck v. Jenness,* 48 U.S. 612, 12 L. ed. 841 (1849), *and Kline v. Burke Construction Company,* 260 U.S. 226, 43 S. Ct. 79, 67 L. ed. 226 (1922). In *Peck v. Jenness, supra,* your Honorable Court stated, at p. 624-625 of 48 U.S.:

". . . Where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. *These rules have their foundation, not merely in comity, but on necessity.* For if one may enjoin, the other may resort by injunction and thus the parties be without remedy; being liable to a process for con-

tempt in one if they dare to prosecute the other". (Emphasis supplied).

In *Kline v. Burke Construction Company, supra,* at 229 of 260 U.S., your Honorable Court stated that in an in rem proceeding:

". . . where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same *res* to defeat or impair the state court's jurisdiction."

What is significant in the instant case is that the respondents' claim in the District Court below has nothing to do with the quantum of their interest in any fund. Respondents' claim has to do with the title and right of possession to the property itself which is now involved in the state court proceedings.

Petitioners recognize that the case of *Madisonville Traction Company v. Saint Bernard Mining Company,* 196 U.S. 239, 25 S. Ct. 251, 49 L. ed. 462 (1905), may be interpreted not to be in accord with the principle that a condemnation proceeding is such an *in rem* proceeding that if a state court first acquired jurisdiction over the proceeding, a federal court has no jurisdiction in any matter affecting the *res.* In that case, which was decided by a five to four decision, the majority held that a condemnation proceeding by a utility corporation under state statutory authority could be removed to the district court for that court to decide not only the amount of damages but whether there was a proper taking. The dissent, by Holmes, J., pointed out that the prior cases on which the majority opinion relied dealt only with compensation and not with title to the property involved, and that although there was no dispute that the ques-

tion of compensation alone could be removed, the question of title could not be removed because of the control of the state over that property. The majority opinion did not discuss the in rem nature of the proceeding. It was pointed out at page 23 of this brief that in *United States v. Petty Motor Company* your Honorable Court recognized that a condemnation proceeding is in rem. (See also the lower court cases for such proposition cited at pages 23-24 of this brief). The *Madisonville Traction Company* case was also discussed in *Chicago, Rock Island and Pacific R. R. Company v. Stude* discussed previously at page 25 of this brief. The majority opinion in that case did not cite the *Madisonville Traction Company* case. However, the majority opinion refused to ground jurisdiction in the district court below because it believed that the question of damages and the question of title to the property were both involved and the case could not be removed. It can be assumed that the court treated the *Madisonville Traction Company* case as standing only for the proposition that if the question involved is solely one of damages the case may be removed to a federal court. This is made clear in the dissent by Frankfurter, J., which cites the *Madisonville Traction Company* case. The basis of the dissent of Frankfurter, J., (and also of Black, J.) is that factually the claim of the plaintiff in the *Chicago, Rock Island, etc.* case was for damages only.

However, even if the *Madisonville Traction Company* case may be so interpreted today as to permit a non-resident landowner whose property is being condemned by a state political sub-division to remove the condemnation proceeding to a district court, the district court in the instant case would have no jurisdic-

tion over the matter since the land owners made no attempt to remove the case within the time called for by the federal removal statute. This statute calls for removal within twenty (20) days.[1] Here the respondents brought their action in the district court almost two years after the resolution of the Board of County Commissioners of Allegheny County and almost one year after the award of the Board of Viewers. Therefore, even if the District Court below would have had jurisdiction over this matter, upon a timely removal petition, since the time had expired, the District Court had no jurisdiction to enter upon the matter subsequently.

II. Even Assuming That the District Court Had Jurisdiction, It Correctly Refused to Exercise Such Jurisdiction.

A. *Principles of comity support the District Court's action.*

In many recent cases your Honorable Court has made it increasingly clear that federal courts should not attempt to interfere with state court proceedings even if jurisdiction were present, and that federal courts should permit state courts to pass upon state statutes not theretofore interpreted before federal courts exercise jurisdiction over a claim which involves such a stat-

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1. Act of June 25, 1948 c. 646, 62 Stat. 937, 28 U.S.C.A. Section 1441 (a), provides for removal. *id.* 62 Stat. 939, as amended, 28 U.S.C.A. 1446 (b) provides for removal within 20 days. This time limitation is mandatory. *Sunbeam Corp. v. Brazin,* 138 F. Supp. 723 (D.C. E.D. Ky. 1956); *Burns v. Standard Life Ins. Co. of Ind.,* 135 F. Supp. 904 (D.C. Del. 1955); *Green v. Zuck,* 133 F. Supp. 436 (D.C. S.D. N.Y. 1955).

ute. *Alabama Public Service Commission v. Southern Railway Company,* 341 U.S. 341, 71 S. Ct. 762, 95 L. ed. 1002 (1951); *American Federation of Labor v. Watson,* 327 U.S. 582, 66 S. Ct. 761, 90 L. ed. 873 (1946); *Spector Motor Co. Inc. v. McLaughlin,* 323 U.S. 101, 65 S. Ct. 152, 89 L. ed. 101 (1944); *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496, 61 S. Ct. 643, 85 L. ed. 971 (1941). See also, *City of El Paso v. Texas Cities Gas Co.,* 100 F. 2d 501 (5 Cir. 1938), *cert. den.,* 306 U.S. 650, 59 S. Ct. 592, 83 L. ed. 1049, *rehear. den.* 306 U.S. 669, 59 S. Ct. 643, 83 L. ed. 1063 (1951). The Court of Appeals for the Third Circuit also recognizes this principle which is in direct conflict with its action in the instant case. *U.S. v. 25.936 Acres,* 153 F. 2d 277 (3 Cir. 1946).

In the *Alabama Public Service Commission* case, where plaintiff sought to enjoin state enforcement of an order of a State Public Service Commission, your Honorable Court decided that although diversity of citizenship and a claim of infringement of constitutional right afford a basis of jurisdiction, exercise of such jurisdiction should, on considerations of comity, be withheld, and the order of the District court granting the injunction was reversed.

In the *Spector Motor Co. case* your Honorable Court stated that action in federal courts involving determination of local law should not be taken pending interpretation of undetermined state law by the state courts. In that case it was held that a district court could not enjoin the enforcement of a Connecticut state tax even though the plaintiffs in the district court claimed the tax contravened the commerce clause of the United

States Constitution. At p. 105 of 323 U.S., the Court stated:

> "Avoidance of . . . . guesswork by holding the litigation in the federal court until definite determinations on local law are made by the state courts, merely heeds this time honored canon of constitutional adjudication."

The principle involved is also aptly stated in *Railroad Commission of Texas, v. Pullman Company,* at p. 500 of 312 U.S.:

> "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion' restrain their authority because of 'scrupulous regard for the rightful independence of the state governments' and for the smooth working of the federal judiciary. (citations) This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restrictions of those powers."

This principle is also clearly set forth in *American Federation of Labor v. Watson,* where the plaintiffs in the district court sought an injunction against enforcement of a state law and defendants filed a motion to dismiss. The district court held that it had jurisdiction and decided that the law did not violate the Federal Constitution and dismissed the complaint. Your Honorable Court reversed the district court and stated that the district

court should let the state court interpret the state statute and remanded the case with directions to retain the complaint pending determination of the proceedings in the state court.

In the *City of El Paso case,* the court of appeals, at p. 503 of 100 F. 2d, speaks of the "increasing disinclination of federal authority to interfere in State matters until State remedies have been exhausted. "This disinclination is founded in comity, rather than on a want of power either as a federal court or as a court of equity."

In *U.S. v. 25.936 Acres* (also referred to previously at page 23 of this brief for recognition by the Third Circuit of the *in rem* nature of a condemnation proceeding) the United States had condemned land in New Jersey and the issue in the federal court was whether a tax lien of the local municipality should attach and be paid from the compensation award or remain as a lien after payment of that award to the landowner. The Court of Appeals reversed the district court and ordered it to retain jurisdiction while it sent the parties to the state court to litigate the status of the lien right under New Jersey law. It is noteworthy that in this case, although only rights to a fund were involved, which would indicate that the district court could exercise jurisdiction over the controversy, the court of appeals, as a matter of comity, declared that the matter should be settled in the state court. Yet, in the instant case which involves not the right to a fund but title to property the same court of appeals would have the district court try the issue even though there is presently pending a state court action which involves the property.

In fact, in the case of *Creasy v. Stevens*, 160 F. Supp. 404 (D.C. W.D. Pa., 1958), now on appeal before your Honorable Court at No. 157 October Term, 1958, *sub. nom. Stevens v. Creasy*, when in 1955 plaintiffs filed their complaint in the district court seeking an injunction against action by Pennsylvania Department of Highways, which complaint alleged that the state's action was repugnant to the federal constitution, a three judge court entered an order staying proceedings pending determination by the state court of the state statute involved. In that case, even though the plaintiffs alleged that the state statute involved was unconstitutional, the court sent the plaintiffs to the state court to *initiate* action there. In the instant case, there is no claim that the eminent domain statute involved is unconstitutional, the parties are already before a state court, and yet the Court of Appeals below reversed the action of the District Court which stated that plaintiffs should first present their claim to the state court. Even more startling is the action of the Court of Appeals when one of the questions is whether the state court before which the parties have been proceeding has jurisdiction of the plaintiffs' claim in the pending proceeding. (This is discussed fully at Part II-C of this Argument, page 38, *infra*.).

B. *As a matter of equitable discretion the District Court was correct in refusing to exercise its jurisdiction.*

In addition to the principle that as a matter of comity the District Court was correct in deferring to the pending state court proceedings, because of the equitable nature of the plaintiffs' case there is another allied principle which supports the action of the District Court. Since plaintiffs were requesting equitable relief, it was within the discretionary power of the court to refuse to exercise its equitable jurisdiction. *Meredith v. City of Winter Haven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. ed. 9 (1943).[1]

In fact, as a court of appeals in a condemnation situation similar to that involved in the instant case has stated, the plaintiffs complaint in the instant case does not even set forth a case for equitable jurisdiction. *National Quarries Co. v. Detroit T. & I. R. Co.,* 10 F. 2d 139 (6 Cir. 1926).

In *Meredith v. City of Winter Haven,* there was diversity of citizenship. Plaintiffs had sought to prevent the city from calling bonds alleging that such action was unlawful. The district court dismissed the bill for

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1. Notwithstanding the fusion of law and equity by the Rules of Civil Procedure this principle remains. *Stainbach v. Mo Hock Ke Lok Po,* 336 U.S. 368, 383, 69 S. Ct. 606, 93 L. ed. 741, (1948); *Gulf Oil Corporation v. Gilbert,* 330 U.S. 501, 514, 67 S. Ct. 789, 91 L. ed. 1040, (1946). The matter of non-exercise of a court's equitable discretion is also adverted to in *Alabama Public Service Commission v. Southern Railway, supra,* at p. 346 of 341 *U.S. and American Federation of Labor v. Watson, supra,* at p. 593 of 327 U.S.

failure to state a cause of action. The court of appeals reversed and stated that the complaint should have been dismissed without prejudice to permit the litigants to go to the state court for a determination of the state law on the question involved. Your Honorable Court reversed the court of appeals stating that in this situation there was no reason for the district court to refuse to exercise its jurisdiction even though state law was involved. What is pertinent to the instant appeal is the Court's examples of when equitable jurisdiction should not be exercised. After first stating that in diversity of citizenship cases the district court should ordinarily decide the case, the Court listed exceptions to that rule as follows, at pp. 235-236 of 320 U.S.:

> "The exceptions relate to the discretionary powers of courts of equity. An appeal to the equity is an appeal to the sound discretion which guides the determination of courts of equity."
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> * * * * * *
>
> "So too a federal court, adhering to the salutary policy of refraining from the unnecessary decision of constitutional questions, may stay proceedings before it, to enable the parties to litigate first in the state court questions of state law, decision of which is preliminary to, and may render unnecessary, decision of the constitutional questions presented. (citations). *It is the court's duty to do so when a suit is pending in the state courts, where the state questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the state action.* Chicago v. Fieldcrest Dairies, 316 U.S. 168." (Emphasis supplied).

The Court then went on to explain that because the decision in the *Winter Haven* case did not require determination or shaping of state policy covering administrative agencies *and did not entail any interference* with such agencies or with the state courts; that jurisdiction should have been exercised.

In the instant case we have a situation which fits squarely within the above stated exceptions. There is a state action pending, the parties in the instant case are parties involved in the state proceedings, the pertinent issue involves statutory procedure in condemnation proceedings, and the decision of the state court will probably obviate any necessity for a decision on any federal constitutional question.

In the *National Quarries* case, which involved a condemnation proceeding similar to that in the instant case, the court of appeals pointed out in strong language that the complaint should have been dismissed by the district court not only because of Section 265 of the Judicial Code (see pages 15-16 of this brief) but because there was a lack of equitable jurisdiction. As the court pointed out in that case, every question in the plaintiff's complaint could have been presented to the state court, there was no denial of constitutional rights, there was no irreparable injury shown and there was no inadequacy of remedy in the state proceedings. So too in the instant case.

C. *Non-exercise of jurisdiction is even more imperative when one of the questions involves the jurisdiction of the state court in order to avoid confusion resulting from different interpretations on jurisdiction.*

Actually, under the principles of comity set forth in Part II-A of this Argument, *supra*, page 30, even if the Court of Appeals were correct in its interpretation that the respondents here could only contest the validity of the taking by the County in a separate proceeding and not in the present state court proceeding, the District Court would have properly exercised its power by sending the litigants to the state court for a determination by that court of the propriety of the taking under the state statute, relying on the fact that if any federal question arose the state court would decide that question according to federal law and any appeal from such a decision could be taken to the Supreme Court of the United States.

However, in the instant case we are not at that point. As is set forth in Part III of this Argument, *infra*, page 41, the Pennsylvania law is clear that the state court in which the condemnation proceeding is now pending has jurisdiction over the plaintiffs' claim to adjudicate plaintiffs' allegation of an improper taking. But, as has been pointed out, even if there is some question about the jurisdiction of the state court, this is all the more reason for the federal courts to defer to the state court on the question. For, certainly, the jurisdiction of a state court under a state statute is solely a state matter, and no determination by a federal court of that question can possibly affect the jurisdiction of

the state court if it decides contrary to the federal court (there being no federal question involved here).

In the cases involving comity and equitable jurisdiction cited above, where the federal courts refused to exercise jurisdiction, there was not a single question which so fundamentally affected the state court as does the question involved in this case. It would appear, without any serious argument, that in view of those cases the question of the jurisdiction of the state court should certainly be referred to the state court.

In *Leiter Minerals, Inc. v. United States, supra,* at 229 of 352 U.S., your Honorable Court viewed the possible results of allowing the district court to exercise jurisdiction and decide a matter of state law. A brief review of the position which could easily result from the decision of the Court of Appeals in the instant case is also pertinent here.

Assume that the District Court proceeds under the Court of Appeals mandate to try the question of the validity of the taking and assume that plaintiffs are successful. Suppose then that the County brings an action in the state court to enjoin plaintiff from taking any action to eject the County, and suppose the state court grants the injunction. Suppose also that the state court determines that it had jurisdiction to decide the legality of the taking in the proceedings now before it. If the Court had jurisdiction of the parties, as it undoubtedly does, and jurisdiction over the subject matter, the plaintiffs not having raised the question in the state court, that question could not be raised in another proceeding. Then we have the delicate question of the effect of the state court proceedings against the effect

of the district court's decision on the merits. This is the type of confusion and conflict which the courts assiduously attempt to avoid. Yet, it is exactly the result to which the court of appeal's decision will inevitably lead. Also, if there is a difference in the interpretation of the state statutory procedure between the court of appeals and the state courts, what law should the district courts located in Pennsylvania follow in the future?

Furthermore, as your petitioners have attempted to point out, we are now involved in lengthy argument before your Honorable Court on many issues including whether a condemnation proceeding is such an *in rem* proceeding as would prevent exercise of jurisdiction by a federal court; whether Sec. 2283 of 28 U.S.C. bars jurisdiction in a federal court in this matter; whether if there is jurisdiction, a federal court should exercise such jurisdiction; whether a state statute gives a state court the jurisdiction the Court of Appeals determines it has or what petitioners claim the Pennsylvania Supreme Court has determined. All these questions and other subsidiary issues are involved simply because the Court of Appeals decided to guess at state law instead of permitting the state courts to interpret that law. For if the state court which now has jurisdiction of the parties decides that it has jurisdiction to determine the question of a taking, there is no further matter to be determined by the federal courts. This demonstrates, perhaps more clearly than all other argument, why the District Court was correct in its determination not to entertain the plaintiffs' suit at least before the time that plaintiffs had attempted to raise this question pending state court proceeding.

III. The Decision of the Court of Appeals Is in Direct Conflict With the Applicable State Law as Enunciated by the Supreme Court of Pennsylvania and Demonstrates the Soundness of the District Court's Action.

As one of the reasons given in its petition for rehearing to the Court of Appeals below, and in its subsequent Petition for Certiorari, the County pointed out that only a week prior to the filing of the Court of Appeal's opinion, the Pennsylvania Supreme Court in *Gardner v. Allegheny County*, 393 Pa. 120, 142 A. 2d 187 (1958) had declared the Pennsylvania law to be directly contrary to the conclusion of the Court of Appeals. In the instant case, the Court of Appeals stated in its opinion that under Pennsylvania law a Board of Viewers proceeding, and the subsequent appeal to the Court of Common Pleas, may only determine the measure of damages and no other question. (R. 29-31). The Supreme Court of Pennsylvania stated that a Board of Viewers " 'must decide *all relevant questions of law or fact* before it can competently make an award of damages or assessment of benefits.' " (R. 38). (Emphasis supplied). The significance of the *Gardner* decision can only be appreciated by understanding the manner in which the question before the Pennsylvania Supreme Court was brought before that court.

The *Gardner* case has been before the Supreme Court on several occasions. As set forth in the first appeal in *Gardner v. Allegheny County*, 382 Pa. 88, 114 A.2d 491 (1955), plaintiff-landowners had sued in equity against County of Allegheny and various airlines requesting injunctive relief because of low flying planes

and alternatively for damages for a *taking* of plaintiff's property because of the low flying. The county filed Preliminary Objections in which it averred that the equity court had no jurisdiction to determine that there had been a taking of plaintiff's property, the County's position being that a taking must be determined through a Board of Viewers proceeding. In the 1955 decision cited above, the Supreme Court sustained the County's position and stated that a court of equity did not have jurisdiction to assess damages for a taking. The court in its decision did not expressly state whether or not the equity court could separate the question of a taking from the ascertainment of damages. Following the 1955 decision, the airlines, as an affirmative defense to the complaint in the Court of Common Pleas, stated that they had no liability to plaintiffs since they were flying over property *taken* by the County which gave the airlines permission to fly over said property. The County again filed Preliminary Objections protesting that the determination of any legal question concerning any taking or whether there had been a taking must be decided in eminent domain proceedings, and that the Court had no jurisdiction to decide that question even as a matter of defense. *The airlines took the position that only the question of damages was within the scope of the viewers proceedings* and that the viewers proceedings could not decide the legal question of whether there had been a taking. In the 1958 appeal (393 Pa. 120, 142 A. 2d 187) the Pennsylvania Supreme Court upheld the County's position and stated that *all relevant questions of law concerning a taking, as well as the determination of damages,* must be decided in the statutory procedure provided in the Second Class County Code.

As the Pennsylvania Supreme Court stated, the Board of Viewers must first decide whether there has been a taking. This, of course, must be a proper taking, otherwise there is no power to award damages. In the instant case, after first admitting the legality of the taking in the pending state court appeal which plaintiffs themselves filed, they now question the legality of the taking. This is a question which, under the *Gardner* case, is properly relevant to the proceedings before the viewers and the Court of Common Pleas.

In *Allentown's Appeal,* 121 Pa. Superior Ct. 352, 183 Atl. 360 (1936) the Superior Court specifically discussed the duties of the board of viewers in a case in which the property owners alleged damage as a result of a taking. The viewers gave an award to the property owners and the City of Allentown filed exceptions to the viewers' report and appealed from the viewers action. The Superior Court specifically held that the board of viewers and the common pleas proceeding, on appeal from the board's determination, must deal not only with the question of damages but with the determination of whether there has been any injury to the property.

There are numerous other Pennsylvania cases involving condemnation proceedings which disclose clearly that more than the question of damages is involved in such a proceeding.[1]

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1. *Holmes' Petition,* 184 Pa. Superior Ct. 105, 132 A. 2d 918 (1957) (where in a viewers proceeding, the parties disputed the question of whether property was taken and, if so, whether the property owner was precluded from seeking damages after a prior proceeding). *Koontz v. Commonwealth,* 364 Pa. 145, 70 A. 2d

In *Creasy v. Lawler,* 8 Pa. Dist. & Co. 2d 535 (1956) *aff'd. per curiam* on the opinion of the lower court, 389 Pa. 635, 133 A. 2d 178 (1957), the court's opinion clearly stated that the question of whether a taking occurred because a highway was converted into a limited access road was a matter to be determined in a viewers proceeding and the court cited *Gardner v. Allegheny County,* 382 Pa. 88 in support. This case arose from the action of the statutory three judge court which stayed federal proceedings initially in *Creasy v. Stevens,* now on appeal at No. 157 October Term 1958 *sub. nom. Stevens v. Creasy* (discussed at page 34 of this brief).

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308 (1950), (The court affirmed a viewers award which found a condemnation although the Commonwealth denied that there was a condemnation); *Hughes, et ux v. Elizabeth Borough,* 343 Pa. 175, 22 A. 2d 726 (1941); (The Supreme Court sustained nonsuiting of a tort claimant on the ground that the proper remedy was in eminent domain proceedings when the damages resulted from a change in grade); *Shapera v. Allegheny County,* 344 Pa. 473, 25 A. 2d 566 (1941), (A viewers award was sustained which determined that the legal effect of a condemnation was to condemn the property owners access); *Heil v. Allegheny County,* 330 Pa. 449, 199 Atl. 341 (1938) (Where the viewers decided the question of whether relocation of a highway took the property owner's land.)

IV. The District Court Was Correct in Dismissing the Action Below Rather Than Staying the Proceedings.

If the District Court had no jurisdiction in this matter, for any of the reasons presented above in this brief, the court clearly was compelled to dismiss the action. See discussion of this point in *Marblehead Land Co. v. Los Angeles County*, 276 Fed. 305, 308-309 (D.C. S. D., Cal. 1921). Such was the action in all of the district courts and courts of appeal cases cited in Part I of this Argument, at page 15, *supra*.

If the court had jurisdiction and therefore had the power to stay proceedings, it was not an abuse of discretion to dismiss the action in the circumstances of this case. Ordinarily, the purpose of retaining a case pending conclusion of the state court proceedings is because there is a definite federal constitutional question involved which will be decided after the determination of a question of state law[1] or is necessary to protect the rights of plaintiffs who may be prejudiced by dismissal.[2] But in the instant case the basic question is whether there was a proper taking under the state statute. The federal question is so remote as to be nonexistent for all practical purposes. Furthermore, the

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1. This was the procedure, for example, in *American Federation of Labor v. Watson; Spector Motor Co. v. McLaughlin; Railroad Commission of Texas v. Pullman Company*, all cited at page 31 of this brief.

2. In *Prouty v. Citizens Utilities Company*, discussed at pages 17-18 of this brief, the court stayed proceedings because there was a problem of a statute of limitations. In *Leiter Minerals, Inc. v. United States*, discussed at pages 19-22 of this brief, proceedings were stayed because a claim of the United States was involved.

rights of the plaintiffs are not prejudiced. There is no statute of limitation applicable here as there was in the *Prouty* case. The defendant, the County of Allegheny, cannot remove itself from the jurisdiction of the District Court if for some reason a proper proceeding must in the future be instituted in the District Court. The likelihood is that the issue raised in plaintiffs' complaint in the District Court will be decided by the state courts and if, by any chance, a federal constitutional question remains, it is one which could be presented to your Honorable Court after decision by the Pennsylvania appellate courts.

CONCLUSION

For the reasons above stated, it is respectfully submitted that the judgment of the Court of Appeals below be reversed and the judgment of the District Court reinstated.

Respectfully submitted.

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APPENDIX A

State Statutes.

Pertinent provisions of the Second Class County Code, Act of July 28, 1953, P. L. 73, found in Purdon's Pa. Stat. Ann. Title 16, are as follows:

(Article XXIV of the Code)

Section 5402. County may hold or acquire lands for air navigation and terminal facilities.

(c) The county may acquire by gift, lease, purchase, or condemnation proceedings any land lying within its territorial limits or the territorial limits of any adjoining county which, in the judgment of the county commissioners, may be necessary and desirable for the purpose of establishing and maintaining air navigation and terminal facilities or of enlarging them, but no such land shall be so acquired in any adjoining county without the assent of the county commissioners thereof.

Section 5403. Condemnation proceedings; title

The proceedings for the condemnation of lands under the provisions of this article and for the assessment of damages for property taken, injured or destroyed shall be conducted in the same manner as provided under article XXVI.

The title acquired by virtue of any such condemnation shall be a title in fee simple.

(Article XXVI of the Code)

Section 5608. Appointment of viewers.

(a) In case the board of commissioners or a majority of them and the parties interested in the land, property or material appropriated, injured or destroyed

by the county fail to agree upon the compensation to be made for the land, property or material so taken, injured or destroyed, upon petition of such commissioners or a majority of them or any person or parties interested and whose land, property or material is affected thereby to the court of common pleas of said county, the said court shall appoint three viewers from the county board of viewers, and appoint a time, not less than twenty nor more than thirty days thereafter, when said viewers shall meet and view the land, property or material to be so appropriated, injured or destroyed.

Section 5613. Proceedings by and before viewers.

The said viewers, having been duly sworn or affirmed faithfully, justly and impartially to decide and true report to make concerning all matters and things to be submitted to them and in relation to which they are authorized to inquire and having viewed the premises and examined the land, property or material to be appropriated, injured or destroyed, shall hear all parties interested and their witnesses, and, having a due regard to and making just allowance for the advantages which may have resulted or which may seem likely to result to the owner or owners of said lands or materials in consequence of the proposed improvement, shall estimate, determine and assess the damages for the land, property or material taken, injured or destroyed, and to whom the same is payable, and the benefits, if any, in connection therewith. Having so estimated, determined and assessed the damages and benefits, they shall prepare a schedule thereof, and give notice to all parties to whom damages are allowed or against whom benefits are assessed of a time, not less than ten days thereafter, and of

a place, where said viewers shall meet and exhibit said schedule and hear all exceptions thereto and evidence.

Section 5616. Report to court.

After making whatever changes are deemed necessary, the said viewers shall make report to the court showing the damages allowed and benefits assessed in each case, and file therewith a plan showing the improvement and the land, properties and materials taken, injured or destroyed. When said report is filed, notice thereof shall be given by publication once in the newspaper or newspapers in which first notices of said view were published. Said notice shall state the date of filing of the report and shall contain a schedule of the damages and benefits shown therein, and shall further state that, unless exceptions thereto are filed within thirty days from the date of filing the said report will be confirmed absolutely.

Section 5623. Exceptions to report.

Upon the report of said viewers or any two of them being filed in said court, any party interested may, within thirty days thereafter, file exceptions to the same, and the court shall have power to confirm said report, or to modify, change or otherwise correct the same, or refer the same back to the same or new viewers with like power as to their report. When said report is first filed in court, the prothonotary thereof shall mark the same "confirmed nisi", and in case no exceptions are filed thereto within said thirty days, he shall enter a decree (as of course) that said report is confirmed absolutely. Within thirty days after the confirmation, modification, changing or correcting of said report, any interested

party may appeal from said decree to the Superior Court or to the Supreme Court, as the case may be.

Section 5624. Demand for jury trial.

Within thirty days after said report is filed in court as aforesaid, such county and any party whose property is taken, injured or destroyed may appeal to the court of common pleas and demand a trial by jury according to the course of the common law. The court of common pleas shall, within thirty days, order what notices shall be given in connection with any part of said proceedings and make all such orders as it may deem requisite, and may, by rule or otherwise, prescribe the form of the pleadings. After verdict and final judgment, either party may have an appeal to the Superior Court or Supreme Court as in other cases.

Section 5627. Title to vest upon payment of award.

Upon payment of the compensation for land or property in accordance with the order of distribution, all claims for compensation shall be deemed paid and satisfied.

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IN THE

Supreme Court of the United States

NO. 347

OCTOBER TERM, 1958

COUNTY OF ALLEGHENY, Petitioner,

v.

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA, and JOSEPHINE MASHUDA, partners, Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS AND APPENDIX

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IN THE

Supreme Court of the United States

NO. 347

OCTOBER TERM, 1958

COUNTY OF ALLEGHENY, Petitioner,

v.

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA, and JOSEPHINE MASHUDA, partners, Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS

CONSTITUTIONAL PROVISION INVOLVED

ARTICLE III, Section 2 of the Constitution of the United States

"Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party; — to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

Counter-Statement of the Question Presented.

STATUTES INVOLVED

United States:

28 U.S.C § 1332; Act of June 25, 1948, c. 646, 62 Stat. 930, as amended by Act of July 26, 1956, c. 740, 70 Stat. 658 (printed in Appendix I of this Brief (at p. 40).

Pennsylvania:

16 Purdon's Pa. Stat. Ann. §§ 5604, 5608(a); 5613, 5616; 5625 and 5626 (Second Class County Code, Act of July 28, 1953, P.L. 723, Art. XXVI, Sections 2604, 2608(a), 2613, 2616, 2625 and 2626.

Sections 5604, 5625 and 5626 of 16 Purdon's Pa. Stat. Ann. are printed in Appendix I of this Brief (pp. 40, 41).

Sections 5608(a); 5613 and 5616 of 16 Purdon's Pa. Stat. Ann. are set forth in Appendix A to Petitioners Brief.

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Where land is purportedly, but invalidly and wrongfully, condemned for no public purpose and thereafter there is instituted an eminent domain proceeding which, under well-settled state law, deals only with issues related to compensation, and subsequently not only is the land not put to a public use within a reasonable time but an invalid private use is made thereof, and where, in such circumstances, a citizen of the state where the land is located could institute a separate action at law in the courts of that state to redress the wrong, may the owners of the land wrongfully seized who are citizens of a different state redress the wrong at law in the Federal Courts, other jurisdictional requirements being present?

COUNTER-STATEMENT OF THE CASE

This is a civil action brought by Respondents in the United States District Court for the Western District of Pennsylvania on grounds of diversity of citizenship. Respondents, Wisconsin citizens, who owned certain land in Allegheny County, Pennsylvania, seek to oust two Pennsylvania corporations, the defendants, from that land and to recover damages. The First Count of the Complaint expressly states that it is a cause of action "in ejectment" (R. 3).

The following statement of facts is based upon the allegations of the Complaint, all of which are admitted by the motion to dismiss filed by the defendant County of Allegheny (petitioner here):

Respondents are all citizens of the State of Wisconsin (R. 3, para. 1). The petitioner is a political subdivision of the Commonwealth of Pennsylvania and a Pennsylvania corporation (R. 3, para. 2). The defendant Martin W. Wise, Inc. (hereinafter called "Martin Wise") is also a Pennsylvania corporation (R. 3, para. 3). The value of the land in controversy, exclusive of interest and costs, is in excess of $3,000.00 (R. 3, para. 4).

Respondent partnership owned two contiguous parcels of land aggregating eight acres located in Moon Township, Allegheny County, Pennsylvania (R. 4, para. 5). On June 16, 1955, petitioner purported to condemn this land for the stated purpose of establishing and maintaining air navigation and terminal facilities at the Greater Pittsburgh Airport (R. 4, para. 6).

Prior to the purported taking, however, petitioner had formulated no definite plan for the use of the land

and had taken no definite or substantial steps, financial or otherwise, to implement any program for the purported public use. On the contrary, at the time of the taking, petitioner's only definite plan and purpose was to lease the land to Martin Wise for the latter's benefit. No public use was contemplated. (R. 4, para. 8).

On September 22, 1955, petitioner petitioned the Court of Common Pleas of Allegheny County to appoint a Board of Viewers "to ascertain and award just compensation for any taking, injury or destruction occasioned to the property of plaintiff [i.e. respondents] by the aforesaid condemnation" (R. 6, par. 19, R. 13).

The Viewers, in a report filed and confirmed *nisi* on March 29, 1956, awarded to the respondents damages in the amount of $52,644.00 for the taking (R. 13).

As required by Statute, within thirty days thereafter, an appeal (sworn to on April 27, 1956)* to the Court of Common Pleas of Allegheny County, Pennsylvania was filed by respondents on the basis that the award of the Board of Viewers was unjust and unreasonable in that the damages awarded were less than the actual value of the property taken and condemned (R. 6, par. 19, R. 13). This action was captioned Frank Mashuda Co., plaintiff v. County of Allegheny, defendant, at No. 1001 July Term, 1956 (R. 10). The County (petitioner here) also appealed the amount of the award (R. 6, par. 19).

Thereafter, on or about May 22, 1956, approximately one month after the appeal was taken, petitioner leased

* Jurat to petition was omitted in printing (R. 13).

all or part of the land in question to Martin Wise. (R. 4, para. 9) By the terms of that lease petitioner surrendered control and possession of the land to the lessee, and allowed an improper and unlawful private use to be made of the land by its lessee (R. 5, para. 10).

Martin Wise used all or part of the purportedly condemned land as a base for its operations as a general contractor (R. 5, para. 11). Few, if any, of its operations had anything whatsoever to do with the establishment or maintenance of air navigation and terminal facilities. (R. 5, para. 11).

On May 3, 1957, the present action was filed by the respondents (R. 3). Petitioner filed a Motion to Dismiss (R. 7), and Martin Wise filed an Answer on the merits which controverted certain allegations of fact made in the Complaint (R. 14). The District Court dismissed the Complaint (R. 26, 27). Upon appeal by respondents, the Court of Appeals for the Third Circuit reversed the action of the District Court and remanded the case for further proceedings (R. 28-33).

SUMMARY OF ARGUMENT

1. This case does *not* involve any question of the constitutionality or interpretation of any statute or any question of the procedural regularity of any administrative action or governmental function. It *does* involve an attempt by respondents, citizens of Wisconsin, to secure a remedy (ouster and damages), at law, in a Federal Court, for what is, on this record, an admittedly wrongful seizure of their land in Allegheny County, Pennsylvania, by the petitioner, Allegheny County, and an admittedly wrongful occupancy of that land by petitioner's lessee, Martin Wise, Inc., the other defendant in this action.

2. Under Pennsylvania law, private property may be taken under the power of eminent domain only for a public use and such public use must be commenced within a reasonable time after the taking. Also under Pennsylvania law, the question of the validity of a purported taking must, or at least may, be raised in a proceeding independent of the statutory proceeding for the award of damages. In this regard, Pennsylvania law establishes and recognizes the following important distinction: (a) all claims based upon and arising out of a valid "taking"—i.e., a valid exercise of the power of eminent domain—must be compensated in the statutory eminent domain proceedings; (b) however, all claims based upon the proposition that the purported exercise of the power of eminent domain was, for any reason, invalid, or that the purported condemnor went beyond the bounds of the "taking", are beyond the scope of the statutory proceeding and must be redressed in a separate proceeding at law or in equity. Just as the stat-

utory eminent domain proceeding cannot award damages when the condemnor goes beyond the established bounds of a legitimate "taking", so here, such proceedings could not, as a matter of *remedy*, order an ouster or give damages for a completely wrongful dispossession.

3. The Court of Appeals for the Third Circuit, by a unanimous decision, participated in by two judges well-versed in Pennsylvania law, correctly recognized and applied the Pennsylvania law, and their decision merits the customary recognition of their judicial and professional experience in that regard.

4. Inasmuch as a Pennsylvania citizen could, in the circumstances of the respondents here, institute a separate action in the State Court, so here, because other jurisdictional requirements unquestionably exist, respondents,—Wisconsin citizens,—have a right to invoke the diversity jurisdiction of the Federal Court. Such diversity jurisdiction, Constitutionally established, Congressionally implemented, and judicially recognized over the years as an essential means to guarantee the efficacy of the "equal protection" clause of the United States Constitution, should not be withdrawn in the absence of some compelling reason.

5. No reason exists here to compel or even justify the withholding of diversity jurisdiction. The Pennsylvania eminent domain proceedings have not obtained jurisdiction over a *res*, because the Pennsylvania law is clear that such proceedings are not *in rem*. 28 U.S.C. 2283 does not apply, because an injunction is not what is sought here. Principles of comity are not involved, as there is here no question of the constitutionality or con-

struction of any state statute. Nor is there any ground for the exercise of equitable discretion motivating non-exercise of diversity jurisdiction, inasmuch as this case is one for redress at law—i.e., ejectment. There are involved here only factual questions to be decided under well-settled Pennsylvania law.

6. This appears to be a classic example of a situation where diversity jurisdiction should and does exist, and it is respectfully requested that this Honorable Court affirm the decision of the Court of Appeals and remand the case to the District Court for trial.

ARGUMENT

Preliminary Statement

The procedural regularity of petitioner's purported exercise of the power of eminent domain is not an issue here. If it is permitted to retain the land, respondents will be compensated. Likewise, this case does not involve the constitutionality or interpretation of a state statute. The statute under which petitioner purported to act authorizes it to take privately owned land to establish and maintain air navigation and terminal facilities. That use is a public one and the statute is constitutional.

However, the mere fact that a constitutional statute authorizes a taking for a public use does not authorize petitioner to seize land for private use and avoid sanctions because it recites in the resolution condemning the land that a public use is intended.

The substantive law of Pennsylvania is clear that the public interest—*i.e.*, a public purpose or use—is the basis of any exercise of the power of eminent domain. Furthermore, the public use must be specific and definite, not vague and indefinite, at the time the land is taken, and, after the power is exercised, the public use justifying the taking must be begun within a reasonable time: *Lance's Appeal*, 55 Pa. 16 (1867); *Palmer Water Co. v. Lehighton Water Supply Co.*, 280 Pa. 492, 124 Atl. 747 (1924); *Winger v. Ayres*, 371 Pa. 242, 89 A. 2d 521 (1952).

The propriety and validity of a purported exercise of the right of eminent domain are proper subjects for scrutiny and correction by judicial action: *McSorley v. Fitzgerald*, 359 Pa. 264, 268, 59 A. 2d 142, 144, 145 (1948).

Argument.

In this proceeding respondents are seeking a judicial determination as to the propriety of the taking. Upon the facts alleged, respondents are entitled to a judgment declaring the supposed taking invalid and ousting the trespassers from possession (R. 3-7).

Because there is a controversy between citizens of Wisconsin as plaintiffs (R. 3) and Pennsylvania corporations as defendants (R. 3) involving an amount in excess of the required jurisdictional amount (R. 3), the District Court has jurisdiction of the case. (28 U.S.C. § 1332).

This Honorable Court has made it plain that where diversity jurisdiction properly lies a Federal Court must fulfill its obligation by according the suitor invoking that jurisdiction his right to trial in the Federal Court. *Meredith v. City of Winter Haven,* 320 U.S. 228, 88 L. ed. 9, 64 S. Ct. 7 (1943); see also *Propper v. Clark,* 337 U.S. 472, 489, 490, 93 L. ed. 1480, 1494, 1495, 69 S. Ct. 1333 (1949) and *Spiegel's Estate v. Commissioner,* 335 U.S. 701, 707, 93 L. ed. 330, 338, 69 S. Ct. 301 (1949).

The purpose of diversity jurisdiction, as explained in the Federalist Papers, No. 80, (Modern Library ed. p. 515) by Alexander Hamilton, as well as by this Honorable Court in *Pleasant Township v. Aetna Life Insurance Co.,* 138 U.S. 67, 34 L. ed. 864, 11 S. Ct. 215 (1891) and in *Burgess v. Seligman,* 107 U.S. 20, 27 L. ed. 359, 365, 2 S. Ct. 10 (1882), is to guarantee the full effect of the equal protection clause of the Constitution. This is accomplished by giving citizens of different states the right to trial of their causes in an impartial tribunal, free from local attachments, and which "owing to its official existence to the Union, will never be likely to feel any bias."

In *Reagan v. Farmers Loan and Trust Co.*, 154 U.S. 362, 38 L. ed. 1014, 14 S. Ct. 1047 (1894), this Honorable Court said that whenever a citizen of a state can go into a court of that state to defend his property against the illegal acts of the state's officers, a citizen of another state may invoke the jurisdiction of the Federal Courts to maintain a like defense. It added that a state cannot restrict a citizen of another state, where local property is invaded by unauthorized acts of the state's officers, to redress in its own courts. Nevertheless, that is exactly what petitioner seeks to do here.

This Honorable Court has consistently adhered to the proposition that if a state official's action can be challenged in a State Court, the proceeding is no different than any other civil action and, if diversity exists, so does federal jurisdiction: *Madisonville Traction Company v. St. Bernard Mining Company;* 196 U.S. 239, 49 L. ed. 462, 25 S. Ct. 251 (1905); *Waterman v. Canal-Louisiana Bank and Trust Company;* 215 U.S. 33, 54 L. ed. 80, 30 S. Ct. 10 (1909); *McClellan v. Carland,* 217 U.S. 268, 54 L. ed. 762, 30 S. Ct. 501 (1910); see also: *Fakouri v. Cadais,* 147 F. 2d. 667 (5th Cir., 1945); *Blacker v. Thatcher;* 145 F. 2d 255 (9th Cir., 1944), Cert. den. 324 U.S. 848, 89 L. ed. 1409, 65 S. Ct. 686 (1951).

The right given by the Constitution of the United States (Article III, Section 2) and by the Congress of the United States (28 U.S.C. § 1332) to the respondent Mashudas of Wisconsin to have their controversy with the County of Allegheny, Pennsylvania, decided in a Federal Court, should not be lightly destroyed. The burden is upon petitioner to show that a specific exception, consistent with the constitutionally provided right, pre-

cludes the exercise of federal diversity jurisdiction here, where by all usual considerations, it clearly exists. Analysis of petitioner's position will demonstrate that no such special exception operates in its favor in this action.

I. The Relevant Pennsylvania Law Permits Testing The Validity of a Purported Taking Under the Power of Eminent Domain In An Action of Ejectment.

Much of petitioner's argument proceeds from the erroneous proposition that the pending proceedings in the Court of Common Pleas of Allegheny County, Pennsylvania, are a bar to this federal action. Interestingly, the County is quick to point out that the issue in this case is *not* an issue in the proceedings in the State Court (Petitioner's Brief, p. 7). In this case the single issue is the *validity* of the "taking" of respondents' property; in the State Court proceedings the single issue is the proper amount of *damages* to be awarded for the "taken" property. An understanding of the Pennsylvania law will demonstrate that this difference is not accidental.

The State Court proceedings are appeals from the amount of an award of damages by a Board of Viewers, and petitioner has not cited even one Pennsylvania case in which the question of the validity of a taking has been decided in a Board of Viewers' proceedings or in an appeal from the award therein. On the other hand, numerous Pennsylvania cases demonstrate that an independent action of trespass, or of ejectment, or in equity, is a proper, if not the only, way to litigate the validity of a purported taking, and that only such independent proceedings can provide an effective remedy for the wrongful "taking."

Thus, the Court of Appeals, after reviewing the Pennsylvania cases, properly concluded herein (R. 30):

> "These authorities establish the propriety, if not the necessity, of testing the validity of a condemnation in a proceeding in the Pennsylvania courts independent of that in which compensation is awarded . . ."

When petitioner, in its petition for rehearing, attacked that conclusion by stressing the recent case of *Gardner v. County of Allegheny*, 393 Pa. 120, 142 A.2d 187 (1958) the Court of Appeals added (R. 49):

> "Counsel for Allegheny County have based their petition for rehearing largely on a decision by the Supreme Court of Pennsylvania on June 3, 1958, in the case of *Gardner v. County of Allegheny*. The Court has examined that decision with great care and is unanimously of the conclusion that it does not control or even assist in the decision of this case . . ."

It is a settled policy of this Honorable Court to accept the findings of a Court of Appeals as to the law of a state within its circuit: *Propper v. Clark*, 337 U.S. 472, 490, 93 L.ed. 1480, 1495, 69 S. Ct. 1333, (1949); *Spiegel's Estate v. Commissioner*, 335 U.S. 701, 707, 93 L.ed. 330, 338, 69 S. Ct. 301 (1949); *Steele v. General Mills*, 329 U.S. 433, 91 L.ed. 402, 67 S. Ct. 439 (1947); *Helvering v. Stuart*, 317 U.S. 154, 162-165, 87 L.ed. 154, 159-161, 63 S. Ct. 140 (1942). This is particularly so where that law is found by judges familiar, from long experience, with the law of the state. Chief Judge Goodrich, who wrote the opinion of the Court of Appeals here, was formerly dean of the University of Pennsylvania

Law School and is an acknowledged authority on Pennsylvania law. Judge Staley, who joined in the unanimous decision, was formerly an outstanding member of the Bar in Pittsburgh, Pennsylvania.

It is anomalous that petitioner, without citing a case to support its position, has nevertheless characterized the decision of such well-qualified judges in the following manner (page 40, Petitioner's Brief):

> "All these questions and other subsidiary issues are involved simply because the Court of Appeals decided to guess at state law instead of permitting the state courts to interpret that law."

That the Court of Appeals was not "guessing" as to the Pennsylvania law is evident from a reference to the standard source book on all matters of Pennsylvania procedure—the monumental treatise known as *Standard Pennsylvania Practice* (1939 ed.). Chapter 71, in Volume 14, at pp. 198 et seq. of that work, is entitled "Eminent Domain Proceedings." Section V of Chapter 71 is entitled "Common Law and Equitable Remedies of Owner". The following Sections thereunder set forth the pertinent Pennsylvania law:

§ 230 thereunder states, in pertinent part, (14 *Standard Pa. Prac.*, p. 579):

> "§ 230. Generally. — The following sections discuss the remedies available to the owner of property taken, injured, or destroyed under the right, or a supposed right, of eminent domain, apart from the statutory remedy of viewers' proceedings already considered. In general, those remedies are the common-law actions of trespass and ejectment,

and proceedings by bill in equity for an injunction. * * *"

§ 231 states, in pertinent part (14 *Standard Pa. Prac.* pp. 579, 580):

"§ 231. Trespass. — Where a corporation enters upon and takes the owner's property under the mistaken belief that it possesses the right of eminent domain, the owner may maintain an action of trespass for mesne profits and the damages suffered as a result of the unauthorized entry upon his land. [Citing *Titus v. Poland Coal Co.*, 275 Pa. 431, 119 A. 540 (1923)] Ever where the corporation possesses the right of eminent domain, an action of trespass may be maintained where the corporation takes, injures, or destroys the owner's property without following the procedure necessary for a proper exercise of its right of eminent domain. [Citing *Pennsylvania R. Co. v. Duncan*, 111 Pa. 352, 5 A. 742 (1886), affirmed in 132 U.S. 75, 33 L. ed. 267, 10 S. Ct. 34 (1889), *Pennsylvania R. Co. v. Miller*, 112 Pa. 34, 3 A. 780 (1886); *Brink v. Borough of Dunmore*, 174 Pa. 395, 34 A. 598 (1896); *Irving v. Media*, 10 Pa. Superior Ct. 132 (1899), affirmed in 194 Pa. 648, 45 A. 482 (1900); *Fink v. Mountain Teleph. Co.*, 26 Berks Co. L. J. 112.] Thus, where a condemning body without the power of taxation, such as a railroad corporation, disturbs the owner in the possession of his property without paying, or giving security for, the owner's compensation, it is liable in trespass for the wrongful entry. *Nor is it a defense to such an action that condemnation proceedings for the assessment of the owner's damages are pending,*

or that a verdict has been reached, but not paid, in the viewer's proceedings. [Citing *Harvey v. Thomas*, 10 Watts, 63 (1840)]" (Emphasis added.)

§ 233 of the same treatise reads, in pertinent part (14 *Standard Pa. Prac.*, p. 588):

"§ 233. Ejectment.—The owner of property occupied under a real or *supposed* right of eminent domain may bring an action of ejectment to recover his property in situations similar to those already considered in connection with his remedy by action of trespass. Thus, where the condemning body enters upon the owner's property *for a purpose not authorized by its charter*, [Citing *Cumberland Valley R. Co. v. McLanahan*, 59 Pa. 23 (1868)] or where it is a private corporation and has not paid or secured the owner's damages before the entry, [Citing *Philadelphia, New Town & N. Y. R. Co. v. Cooper*, 105 Pa. 239 (1884)] or even where it is a municipal corporation and has not complied with the condemnation procedure set out in a statute, [Citing *Harrisburg v. Crangle*, 3 Watts & S. 460 (1842)] the owner may recover possession of his property by an action of ejectment. *So also, where the property acquired by condemnation is put to a use other than that for which it was condemned, the property reverts to the owner and he may eject the one asserting the right to use the property for the different purpose.* [Citing *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. 23 (1883)]. But the condemning body is permitted *a reasonable time to put the property to the use for which it was condemned;* the owner may not bring ejectment a few days after the condemnation and before the condemning body has had a reasonable

opportunity to put the property to a proper use. [Citing *Ross v. Pennsylvania R. Co.*, 1 Sadler 392, 4 A. 850 (1886)]. (Emphasis added)

§ 235 of the same standard work reads as follows in pertinent part (14 *Standard Pa. Prac.*, p. 593):

§ 235. Injunction and Other Equitable Remedies.—The situations in which equity will intervene by means of injunction to prevent a wrongful appropriation of property under a supposed or real right of eminent domain are similar to those already considered in connection with the owner's remedy by action of trespass or ejectment at law. * * *

The decision of the Court of Appeals and the above quotations from *Standard Pennsylvania Practice* are fully supported by authority.

The statutory proceeding in the state court is governed by Article XXVI of the Second Class County Code (Act of July 28, 1953, P. L. 723; 16 Purdon's Pa. Stat. Ann §§ 5601-5633) which is typical of Pennsylvania statutes establishing the procedure for recovery of damages for a "taking" of property under the power of eminent domain. The statutory provisions demonstrate that the proceedings therein are designed solely for assessing compensation; they assume the taking was lawful. Thus the "right to damages" is given to owners of property taken, injured or destroyed where the right of eminent domain "*has been* exercised" [counsel's note: not "is being" or "will be"] (§ 5604) (Emphasis supplied); Viewers are appointed only if the parties "fail to agree upon the compensation to be made" (§ 5608 (a)); the Viewers' function is to "estimate, determine and as-

sess damages * * * and the benefits, if any (§ 5613); the Viewers' report merely shows "damages allowed and the benefits assessed" (§ 5616). An award of damages is contemplated (§§ 5625, 5626) presupposing a valid condemnation, for otherwise there are no "damages" to assess. The respondents' appeal here to the Common Pleas Court is entirely consistent with that procedure—it raised only the question of damages.

Pennsylvania cases dealing with problems of the statute of limitations (e.g. *Philadelphia Parkway*, 250 Pa. 257, 95 Atl. 429 (1915); *H. C. Frick Coke Company Appeal*, 352 Pa. 269, 42 A 2d. 532 (1945)) make it plain that statutory eminent domain proceedings are provided merely to implement the well-known Federal and State constitutional mandates that compensation must be paid for property taken and the only issue involved in such proceedings relates to the claim for compensation or damages, that the institution of an eminent domain proceeding is not even essential to a "taking" and that the claim for compensation may be barred by an applicable statute of limitations just like any other claim for damages or compensation.

The following cases demonstrate that the validity of the exercise of the power of eminent domain, the condemnor's right to take, or the manner of taking, *must* be, or at least *can* be, challenged in a proceeding in the courts, independent of any statutory eminent domain proceeding which may be pending: *Spann v. Joint Boards of School Directors*, 381 Pa. 338, 113 A. 2d 281 (1955); *Colove v. Robesonia Borough*, 364 Pa. 626, 73 A. 2d 679 (1950); *Caruthers v. Peoples Natural Gas Company*, 155 Pa. Superior Ct. 332, 38 A. 2d 713 (1944);

Dexter v. Pennsylvania Power Company, 127 Pa. Superior Ct. 419, 193 Atl. 94 (1937); *Pioneer Coal Co. v. Cherrytree and D. R. R. Co.*, 272 Pa. 43, 116 Atl. 45 (1922); *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305, 88 Atl. 487 (1913) (see particularly p. 311 of 241 Pa.); *Vinton Colliery Co. v. Blacklick & Yellow Creek R. R. Co.*, 226 Pa. 131, 75 Atl. 185 (1910); *C. P. Spruse & Sons, Inc. v. Reading Co.*, 12 D. & C. 465 (C. P. Phila. 1929).

See also *Colgate v. Philadelphia Electric Power Co.*, 20 F. 2d 263 (E.D. Pa. 1927), *app. dism.*, 276 U.S. 589, 72 L.ed. 719, 48 S. Ct. 207 (1928), where a Federal Court applying Pennsylvania law expressly stated that a question as to the right to condemn cannot be raised at the trial to determine damages, because that trial is merely of a feigned issue to determine solely the question of compensation.

In this connection it makes no difference whether the invalidity of the purported exercise of the power of eminent domain arises because (as in *Palmer Water Co. v. Lehighton Water Supply Co.*, 280 Pa. 492, 124 Atl. 747 (1924)) it was made either without a *bona fide* intent to be applied to a public use or was not followed by public use within a reasonable time, or because (as in *Philadelphia New Town & New York R. R. Co. v. Cooper*, 105 Pa. 239 (1884); *Kiel v. Chartiers Valley Gas Co.*, 131 Pa. 466, 19 Atl. 78 (1890); *Brink v. Borough of Dunmore*, 174 Pa. 395, 34 Atl. 598 (1896); *Studebaker v. The New Castle Gas Co.*, 7 Pa. Superior Ct. 641 (1898); and *Reap v. Scranton*, 7 Pa. Superior Ct. 32 (1898)) of a failure to comply with the technical and procedural requirements of the statute authorizing condemnation. In any such case a separate challenge is proper.

Palmer Water Company v. Lehighton Water Supply Co., supra, and *Johnston v. Delaware, Lackawanna & W. R. R. Co.*, 245 Pa. 338, 91 Atl. 618 (1914) demonstrate that an invalid exercise of the power of eminent domain is not an eminent domain "taking" at all—but is a mere *trespass*. This is further emphasized by *Cochran Coal Co. v. Municipal Management Co.*, 380 Pa. 397, 110 A. 2d 345 (1955) where a municipal authority *with the power of eminent domain* was held to be liable in an action of *trespass*, because, although it took plaintiff's property, it did not do so through an exercise of the power of eminent domain.

Under Pennsylvania law, ejectment is always the proper remedy to oust one from the wrongful possession of a plaintiff's property: *Shannon v. Reed*, 355 Pa. 628, 50 A. 2d 278 (1947); *Dice v. Reese*, 342 Pa. 379, 21 A. 2d 89 (1941); *Rochester Borough v. Kennedy*, 229 Pa. 251, 78 Atl. 133 (1910). Ejectment is the proper remedy where the possessor's claim is based upon a purported condemnation: *Caruthers v. Peoples Natural Gas Co., supra; Dexter v. Pennsylvania Power Company, supra*; see also *Colgate v. Philadelphia Electric Co., supra*. Respondents' suit here is in ejectment.

The foregoing analysis of the Pennsylvania law establishes, we believe, that the validity of the purported taking *must* be challenged in a proceeding independent of the statutory proceeding in which compensation is awarded. However, as the Court of Appeals so clearly recognized, the respondents' position is not dependent upon finding that such is the Pennsylvania law. Respondents' position is sound even though the Pennsylvania law is merely that the question of validity *may* be

raised in a proceeding independent of the statutory proceeding for the award of damages. The Pennsylvania cases conclusively demonstrate that the remedy of an independent proceeding is available. The burden upon petitioner, if it is to be successful in this appeal, is to establish that the statutory proceeding is the *only* method of testing the validity of the taking; it is not sufficient for it to show only that the question *may* be litigated in the statutory proceeding. It is submitted, however, that the petitioner has not even established that it *may* be so litigated.

As previously observed, the petitioner has not cited one case so holding. It cites exclusively cases which hold merely that certain legal questions other than the amount of damages may be passed upon in the Board of View proceedings (Petitioner's Brief, p. 41 et seq.). Analysis discloses, however, that not one of such cases involved a question of the *validity* of the taking; in all of them the "other legal issue" was directly related to the question of damages.

Thus, the cases cited in the footnote beginning on page 43 of Respondents' Brief all involved questions as to what, if anything, was actually taken. Any award of damages must be based upon the value of the specific property taken and hence it is clear that a fundamental inquiry in any proceeding to award damages is *what* was taken.

The main argument of the petitioner in this area of discussion is based upon the case of *Gardner v. County of Allegheny*, 393 Pa. 120, 142 A. 2d 187 (1958), which had previously been before the Pennsylvania Supreme Court at 382 Pa. 88, 114 A. 2d 491 (1955). As the Court

of Appeals held (R. 49) the *Gardner* cases in no way modify the Pennsylvania law as previously enunciated—and are not applicable to this case.

To the exact contrary, the Pennsylvania Supreme Court, in the last *Gardner* case, 393 Pa. 120, 142 A. 2d 187 (1958), expressly recognized the right to proceed in an independent action at law* if there was not a "taking" i.e., a valid exercise of the power of eminent domain. It further recognized, by reliance upon *Powell Appeal,* 385 Pa. 467, 123 A. 2d 650 (1956), that an eminent domain proceeding is limited to such questions as relate to the issue of *the amount of damages* and that title to land must be tried in an action at law.

In recognition of the propriety of an independent action, the Pennsylvania Supreme Court said (393 Pa., at 128, 142 A. 2d, at 191):

> "It is clear from the present pleadings that plaintiffs have been damaged, and the questions are: who must pay for this damage, what action or actions can be brought by plaintiffs, and who are proper parties therein? The answer to these questions will depend, in the last analysis, upon the facts developed at the trial of the case. For example, the nature and extent of the trespasses; the amount

*In that case only an action of trespass was mentioned, obviously because under Pennsylvania law ejectment is not maintainable unless the plaintiff has been deprived of possession of his property (*Brennan v. Shore Brothers, Inc.* 380 Pa. 283, 110 A. 2d 401 (1955); *LaRosa v. McVicker,* 185 Pa. Superior Court 95, 137 A.2nd 861 (1958) and in the *Gardner* case the plaintiffs had not been dispossessed, but were complaining of planes flying overhead.

of interference with plaintiffs' lives or properties; whether frequent and dangerous and unlawful flights will amount to trespasses or by their nature, character and frequency, are so permanent as to amount to a 'taking'; and if a 'taking', whether it be a 'taking' of an easement or a fee simple—all of these questions will, in the last analysis, we repeat, depend upon the facts which are produced at the trial *at law.*". (Emphasis supplied.)

The court then merely stayed the equity proceedings in expectation both of actions of trespass and of eminent domain proceedings.

The *Gardner* case is therefore completely consistent with the prior Pennsylvania law. That law establishes that where the plaintiff's claim is based upon a valid "taking"—i.e. is a claim for compensation for such taking—his only *remedy* is in the statutory proceeding provided and, of necessity, all issues which must be resolved to fully adjudicate his claim for compensation must be decided therein. On the other hand, where the claim for relief is not based upon a valid taking—i.e. where the claim is that the taking is invalid (as in *Palmer Water Co. v. Lehighton Water Supply Co., supra,* and in *Philadelphia, New Town & N.Y.R.R. Co. v. Cooper, supra*) or even where the claim is merely for damages from acts in slight geographical excess of the bounds of a valid "taking" (as in *Culver v. Commonwealth,* 346 Pa. 262, 29 A. 2d 531 (1933) and *Koontz v. Commonwealth,* 364 Pa. 145, 70 A. 2d 308 (1950)), the matter is beyond the scope of the statutory eminent domain proceeding and the *remedy* is to be found in an appropriate legal or equitable proceeding.

It is precisely because the statutory proceeding cannot provide redress in the form of the needed *remedy* for any wrong—i.e., any departure from a valid "taking"—that a separate proceeding is necessary, whether it be to provide damages for a trespass beyond the legal limits of a road, or to secure redress in the form of an order of ouster for an invalid taking, or otherwise.

The *remedy* is what is important. Here the respondent Mashudas are not interested in an academic decision, what they desire is the return of their land, a *remedy*—ouster—which the statutory proceeding obviously cannot make available.

In the circumstances before this Honorable Court, the eminent domain proceedings, no matter what questions they might *consider*, obviously could not issue a judgment of ouster or damages for the trespass. That is why a separate action of ejectment has always been requisite and proper in circumstances such as these.

Similarly, *Allentown's Appeal,* 121 Pa. Superior Ct. 352, 183 Atl. 360 (1936) is not inconsistent with the Court of Appeals' decision or the settled Pennsylvania law. It only held that, if there were a taking, damages for all injuries which were the direct, immediate, necessary and unavoidable consequences of the taking must be awarded in the Viewers' proceeding. Again—the only issue was the *amount* of damages to be awarded.

It is clear, therefore, that none of the cases relied upon by the petitioner is inconsistent with the proposition that a proceeding independent of the statutory proceeding for the award of damages is the only available method of testing the validity of a purported "taking," as was held in *Colgate v. Philadelphia Electric Co., supra.*

Not one of the cases cited by the Petitioner even involved the validity of the purported taking. Rather,

they all related to an issue ancillary to the award of damages.

However, even if the language relating to those issues ancillary to the award of damages was to be construed as indicating that the question of the validity of a taking might be raised in the statutory proceeding, petitioner would not be aided thereby. Petitioner's success depends upon showing that the statutory proceeding is the *exclusive remedy*—and the cases it cites certainly do not establish that.

It is respectfully submitted that the issue of Pennsylvania law was correctly decided by the Court of Appeals and should be accepted by this Honorable Court. That law is that a property owner can, if indeed he is not required to, question the validity of a condemnation in a proceeding independent of the statutory proceeding for the assessment of damages. It is *only* in such separate proceeding that he can secure the *remedy*.

II. Effect of Pennsylvania Law: The District Court Has Jurisdiction

The Pennsylvania law has a dual effect: (1) it establishes that respondents have a right to bring and maintain this action; (2) it makes inapplicable the petitioner's contentions with respect to the jurisdiction of the District Court.

As pointed out heretofore, under Pennsylvania law ejectment is the proper *remedy* for recovery of possession of property wrongfully taken by another, whether under a purported, but invalid, exercise of the power of eminent domain or otherwise. Under Pennsylvania law a proceeding independent of the statutory proceeding for the assessment of damages is either a proper, or the only, way of testing the validity of a purported "taking".

Because the plaintiffs are citizens of Wisconsin, whereas the defendants are Pennsylvania corporations, the matter is within the diversity jurisdiction of the District Court. Thus the propriety of the suit is fully established.

The effect of that law upon the petitioner's contentions will be treated in the following sections.

A. *The State Court Proceedings Are Not In Rem; Therefore the State Court Proceedings Are Not the Exclusive Remedy.*

A substantial portion of the petitioner's contentions is based upon the proposition that the State Court proceedings are *in rem* and hence the Federal Court may not interfere with the State Court proceeding by also assuming jurisdiction. This argument is not only directly made (beginning on page 23 of Petitioner's Brief), but is implicit in its argument that 28 U.S.C. Sec. 2283 prevents the exercise of jurisdiction (Petitioner's Brief, page 13 et seq.).

Respondents take no issue with the general proposition that a court should not, and will not, assume jurisdiction over a *res* which is presently the subject of an *in rem* proceeding in another court. Plaintiffs do take issue, however, with the petitioner's suggestion that the State Court proceedings are *in rem*. Although the petitioner has cited many cases holding that some eminent domain proceedings are *in rem*, it has cited none which hold that a *Pennsylvania* eminent domain proceeding of the type involved here is an *in rem* proceeding.

A federal condemnation admittedly is an *in rem* proceeding. Title 28 U.S.C., § 1358, together with Form 29 issued by this Honorable Court pursuant to Rule 84 of the Federal Rules of Civil Procedure, demonstrate

that a condemnation proceeding involving the United States is much more than a mere dispute as to compensation. The Court is required, in the first instance, to make a formal award of the land to the United States. It is this award which makes the action *in rem*, as was pointed out in *United States v. 625.91 Acres of Land*, 49 F. Supp. 997 (E.D. Mo. 1943) which said (p. 1000):

> "Generally speaking, proceedings under the right of eminent domain are said to be proceedings in rem. *The initial stage of such proceedings is a proceeding in rem. For then it is determined whether the condemnor has the right to exercise the power and if so if its exercise is for a public use.* Those questions are necessarily determined preliminary to any inquiry as to damages, because absent appropriate answers thereto no occasion arises for considering damages. The exclusive power in one court to determine whether the property shall be appropriated and put to the use of the condemnor in a public service or retained by its owners for their private use is absolutely necessary *because then it is the res that is the subject of the order and the res is being awarded to one or the other of opposing interests.* For illustrative purposes it may be observed that when one court, state or federal, has acquired jurisdiction of such a cause the rule of the 'res cases' [citation] would prohibit another court from taking jurisdiction of a proceeding, the nature of which was to adjudicate the right of the condemnor in the other action to acquire the property." (Emphasis added.)

The Pennsylvania law and practice is entirely different. The land is taken merely by the adoption of the

resolution so reciting: *Hunter v. McKlveen,* 353 Pa. 357, 45 A.2d 222 (1946); *Philadelphia Appeal,* 364 Pa. 71, 70 A. 2d 847 (1950); *Lakewood Memorial Gardens Appeal,* 381 Pa. 46, 112 A.2d 135 (1955); *Chelten Trust Co. v. Blankenburg,* 241 Pa. 394, 88 Atl. 664 (1913).

The right to damages is a purely personal one which belongs to the owner of the land at the time of the taking and does not pass to a subsequent purchaser: *Powell Appeal, supra; Lakewood Memorial Gardens Appeal, supra*; *Kaufmann v. City of Pittsburgh,* 248 Pa. 41, 93 Atl. 779 (1915). It is a "vested" right of which the condemning authority cannot deprive the owner without his consent: *Philadelphia Appeal, supra,* although, as pointed out hereinabove, an applicable statute of limitations may bar the claim based on such right (see p. 18 of this Brief). The fact that the "taking" can be effective, even though the statutory proceeding itself is barred, thus demonstrates that there is no *in rem* aspect involved.

As the cases cited heretofore (pages 15 through 20) illustrate, the only issue in the Pennsylvania statutory condemnation proceeding is the amount of compensation and related subsidiary questions. As also developed, the validity of a taking may, or probably must, be litigated in a separate proceeding. That latter aspect, of course, is the antithesis of considering the condemnation proceedings as being *in rem.* It is not *in rem* for other State Court proceedings; it is, therefore, not *in rem* for Federal Court proceedings.

A Pennsylvania statutory eminent domain proceeding is not *in rem* and; hence, the cases relied upon by the petitioner from jurisdictions other than Pennsylvania

are of no moment. Nor are cases involving other types of *in rem* proceedings of any consequence here.

Because, in Pennsylvania, the issue of "validity" of the taking and the issue of compensation must, or at least may, be litigated in separate proceedings, a case such as *Chicago, R.I. & P.R.R. Co. v. Stude*, 346 U.S. 574, 98 L.ed. 317, 74 S.Ct. 290 (1954) is not pertinent here. In that case, the railroad sought to litigate, in the Federal Court, the issue of the amount of compensation which was necessarily involved in the state eminent domain proceeding. Here, the respondents seek to litigate the issue of "validity" which either cannot, or at least need not, be involved in the State Court proceedings.

B. *28 U.S.C. Sec. 2283 (Act of June 25, 1948, c. 646, 62 Stat. 968) Does Not Preclude Federal Jurisdiction.*

The Complaint filed herein establishes that this is a legal action in ejectment by respondents who seek to oust petitioner and another defendant who are in wrongful possession of respondents' land. Although alternative and supplemental relief, including an injunction, was requested the matter should now be considered, as it was by the Court of Appeals, as though no such relief were requested.

28 U.S.C. Section 2283 specifies that "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The relief sought by respondents is not an injunction staying a state court proceeding, but rather a judgment declaring certain land as being that of re-

spondents and ousting petitioner and its lessee therefrom. Because no injunction is involved in such relief, 28 U.S.C. Sec. 2283, by its very provisions, has no application whatsoever. The petitioner seeks to avoid that inevitable conclusion by arguing that, even though no injunction to stay a state court proceeding is sought or entered, Section 2283 applies if the result will be the same.

The basic defect in petitioner's attempt to apply Section 2283 to this case is pointed up in the Court of Appeals' opinion (R. 31):

> "Moreover, since the question involved before the federal court need not, and perhaps cannot, be raised in the pending state action, the exercise of diversity jurisdiction here will not directly interfere with the Common Pleas Court's handling of its case. True, if the plaintiffs are successful in attacking the validity of the purported condemnation, there will no longer be a need for an adjudication of damages, because there will be no damages. But that is nothing more than would occur as a result of taking the same steps in a state court. Furthermore, we see no inconsistency in the plaintiffs complaining about the amount of damages awarded by the viewers in the Common Pleas court in Pittsburgh and at the time attacking, in a separate federal proceeding, the legality of what the County has done."

To the Court of Appeals observation, we might add that petitioner's argument would make Section 2283 operate the same as a general *lis pendens* doctrine. In any instance where cases involving the same issues (here they are not) are pending in both a State and Federal court, the entry of judgment in one action will,

under the principle of *res judicata,* dispose of the other. However, it is uniformly held that the prior pendency of one suit, or the doctrine of *lis pendens,* is inapplicable and both suits will continue until final judgment is entered in one: *Kline v. Burke Construction Co.,* 260 U.S. 226, 67 L.ed. 226, 43 S. Ct. 79 (1922); *Byrd-Frost v. Elder,* 93 F. 2d 30 (5th Cir., 1937), cert. denied, 303 U.S. 647, 82 L.ed. 1108, 58 S. Ct. 646 (1938). Furthermore in this case the issues are not the same as in the State Court proceeding, and, moreover, the critical facts of the case, petitioner's putting the property to a non-public use and petitioner's failure to make a public use of the property within a reasonable time after taking — did not occur until *after* completion of the Viewers proceeding and *after* the appeals had been taken to the Common Pleas Court of Allegheny County.

In the light of the foregoing it is inevitable that petitioner, in its attempt to prove that Section 2283 applies even though no injunction is sought, is forced to rely upon the *in rem* argument. We submit that that *in rem* argument is made no sounder by incorporating it with the Section 2283 argument, nor is the Section 2283 argument enforced by combining it with the *in rem* argument. Both must fail, either separately or jointly, because under Pennsylvania law the State Court proceeding is not *in rem* and because under federal law Section 2283 is not equivalent to a *lis pendens* statute.

It is also clear that Section 2283 does not affect the *subject matter* jurisdiction of a Federal Court: *Meredith v. City Winter Haven, supra, Smith v. Apple,* 264 U.S. 274, 68 L. ed. 678, 44 S. Ct. 311 (1924). The prohibition is directed only to the issuance of an injunction.

Argument.

An analysis of the cases cited by Petitioner in support of its Section 2283 argument demonstrates that they fall within one or both of the following classes: (a) essentially an injunction against the State Court proceeding was sought, or (b) the State Court proceeding was *in rem*.

The following all fall within classification (a): *Amalgamated Clothing Workers of America v. Richman Bros.*, 348 U.S. 511, 99 L.ed. 600, 75 S. Ct. 452 (1955); *Haines v. Carpenter*, 91 U.S. 254, 23 L.ed. 345 (1876); *Collins v. LaClede Gas Co.*, 237 F. 2d 633 (8th Cir. 1956), cert. den. 352 U.S. 1025, 1 L.ed. 2d 597, 77 S. Ct. 591; reh. den. 353 U.S. 919, 1 L.ed. 2d 718, 77 S. Ct. 677 (1957); *Baber v. Texas Utilities Co.*, 228 F. 2d 665 (5th Cir. 1956); *Harrison v. Triplex Gold Mines Limited*, 33 F. 2d 667 (1st Cir. 1929); *National Quarries Co. v. Detroit T. & I. R. Co.*, 10 F. 2d 139 (6th Cir., 1926); *Stenger v. Stenger Broadcasting Co.*, 28 F. Supp. 407 (M.D. Pa. 1939); *Marblehead Land Co. v. Los Angeles County*, 276 Fed. 305 (S.D. Cal. 1921); *Dillon v. Kansas City Suburban Belt R. R. Co.*, 43 Fed. 109 (W.D. Mo. 1890).

Prouty v. Citizens Utilities Company, 257 F.2d 692 (2nd Cir. 1958), cert. denied 358 U.S. 867, 3 L.ed. 2d 99, 79 S. Ct. 98 (1958), falls within class (b). As the Court of Appeals found, the Vermont proceeding was *in rem*, and under familiar rules, the Federal Court would not exercise jurisdiction which would affect the *res*. *Baber v. Texas Utilities Co., supra*, and *Collins v. Laclede Gas Co., supra*, fall within both classifications, and in the latter case the additional defense of *res adjudicata* was also present.

None of the cases support the contention that a Federal Court cannot entertain an action of ejectment

because a personal action—*i.e.* one seeking money damages—is pending in a State Court. On the other hand, there is authority that a Federal Court *will* enjoin condemnation proceedings in a State Court when the intended use of the land is not a proper public use: *Weaver v. Pennsylvania-Ohio Power & Electric Co.*, 10 F.2d 759 (6th Cir., 1926). See also: *Colgate v. Philadelphia Electric Power Co.*, 20 F.2d 263 (E.D., Pa. 1927), app. dismissed 276 U.S. 589, 72 L.ed. 719, 48 S. Ct. 207 (1928). In the *Weaver* case the allegations were almost identical with those contained in the Complaint here.

Thus it is apparent, as the Court of Appeals found, that Section 2283 does not apply to this case at all.

Cases such as *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 1 L.ed. 2d 267, 77 S. Ct. 287 (1957), rehearing den. 352 U.S. 1019, 1 L.ed. 2d 560, 77 S. Ct. 553 (1957), and other cases cited in Part I of petitioner's Brief, are not apposite. The *Leiter* case was a suit for an injunction, and involved questions of the interpretation of a state statute and of constitutionality, none of which elements are concerned here. Actually, the *Leiter* case supports respondents' position here, as this Honorable Court recognized the propriety of trying title to land in a separate Federal Court proceeding.

C. *Principles of Comity Do Not Require Dismissal.*

Beginning at page 30 of its Brief, petitioner asserts that comity requires, or at least justifies, the dismissal of respondents' action. It argues that Federal Courts should permit State Courts to pass upon state statutes not theretofore interpreted before assuming jurisdiction over claims involving such statutes. In support of that argument it cites, with one exception (*U.S. v. 25.936 Acres*, 153 F. 2d 277 (3rd Cir. 1946)) cases of equitable proceedings involving the constitutionality of state statutes. Analysis of the case law will show that the rule is limited to the precise situations covered by the cited cases. It is not a rule of the wide application which petitioner seeks to establish for its benefit here.

If the comity principle were as broad as the petitioner contends, federal diversity jurisdiction would only exist where there are no legal questions under state law. Federal courts would be fact finding tribunals only. The decisions of this Honorable Court establish that such is not the case. In *Propper v. Clark, supra*, and *Meredith v. City of Winter Haven, supra*, it was forcefully pointed out that it is the duty of the Federal Courts to decide questions of state law where required, even though the determination might be difficult. The same cases also made clear that the only time a Federal Court can decline to exercise its jurisdiction is when the proceeding is in equity and the constitutionality of a state law is involved. Neither circumstance exists here. There is not even a question of statutory interpretation here.

For the same reasons the present case is also fundamentally different than *Stevens v. Creasy*, 160 F. Supp.

404 (W.D. Pa. 1958) pending in this Honorable Court at No. 157 October Term 1958 and *City of Thibodaux v. Louisiana Power and Light Company*, 255 F. 2d 774 (5 Cir. 1958) also pending in this Court at No. 398 October Term 1958. In both of these cases the constitutionality of a state statute is in issue, and in fact appears to be the crucial issue.

Moreover, as the prior discussion of the Pennsylvania law clearly illustrates, the substantive law of Pennsylvania applicable to the case is settled. The issue at trial would be only factual. The District Court would only be required to determine whether the evidence established the invalidity of the taking under the settled Pennsylvania law. Similarly, as heretofore pointed out and as the Court of Appeals found, the procedure followed by respondents is in conformity with long standing Pennsylvania practice. Thus, even under the rule advocated by the petitioner, there is no occasion for a refusal to exercise federal jurisdiction in this case.

The fact that there is no question as to the applicable Pennsylvania law distinguishes this case from *U.S. v. 25.936 Acres*, 153 F. 2d 277 (3rd Cir., 1946) where the Court of Appeals found that the applicable New Jersey law relating to tax liens was uncertain. Moreover, that case, if interpreted as being applicable to actions at law generally, is clearly in conflict with the rule enunciated by this Honorable Court in *Propper v. Clark, supra*, and *Meredith v. City of Winter Haven, supra*. If it has any validity at all, it should be limited in its application to unsettled legal problems relating to state tax liens. This limitation is essentially an application of the *in rem* doctrine because of the nature of tax liens.

D. *A Refusal To Exercise Jurisdiction As A Matter Of Equitable Discretion Is Improper.*

Petitioner argues, beginning at page 35 of its Brief, that the principle of equitable discretion permits or requires the Federal Court to refuse to exercise its jurisdiction here. This argument is particularly novel because the proceeding is one at law, in ejectment, not one in equity.*

The inapplicability of the doctrine to actions at law was pointed out in unmistakable terms in both *Propper v. Clark, supra,* and in *Meredith v. City of Winter Haven, supra.,* which are a full and complete answer to the County's contention.

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* It is well settled, in Pennsylvania that equity cannot try title to land. See, e.g. *Teacher v. Kijurina,* 365 Pa. 480, 484, 485, 76 A.2d 197, 200 (1950).

CONCLUSION

The law, both Federal and Pennsylvania, is clear. Diversity jurisdiction exists in this case. There is no exception or qualification to that jurisdiction applicable to this case. If then, petitioner is to be successful, this Honorable Court must nullify a right granted to the Respondents by the Constitution of the United States and by the Congress of the United States and long protected by this Honorable Court. We submit that this Honorable Court should not do so.

In the final analysis, petitioner's argument is that the states should be permitted to handle certain matters —at least questions involving the validity of condemnation proceedings—without the resort to a Federal Court. It is suggested that by so doing possible conflicts and confusion will be avoided. Of course, conflicts and confusion might result in any instance where there is concurrent jurisdiction in two or more courts, although the decision in *Erie R. R. v. Tompkins*, 304 U.S. 64, 82 L.ed. 1188, 58 S. Ct. 817 (1938) would avoid much of that conflict or confusion.

The framers of the Constitution could not have been blind to that disadvantage. Nevertheless, they believed that the availability of a Federal Tribunal in diversity cases was of greater importance to the people than the avoidance of the possible conflict and confusion incident to the maintenance of parallel judicial systems, and hence established that parallel system. Similarly, the Congress of the United States, in implementing that Constitutional provision, has resolved the problem in favor of the parallel system where the amount in controversy exceeds a given figure. Whether petitioner agrees with the conclusion is immaterial—the Consti-

tution, the Congress and this Honorable Court have all spoken and until changed by the people or by the Congress that should be the law.

The instances noted heretofore in which a Federal Court has declined to decide a case, even though jurisdiction would otherwise lie, are not inconsistent with the Constitutional and Congressional mandates. Rather, they are consistent with long-standing rules of law which are of even more ancient origin. The rule that one court will not interfere, directly or indirectly, with a pending *in rem* or quasi *in rem* proceeding, is a long-standing recognition of the fact that judicial anarchy will result if a court's control over specific property once attached can be infringed by another court. Conversely, the law has long recognized that the same principle is unnecessary where personal actions are involved—that the litigant's right to choose his forum is a superior right. Similarly, the law has always recognized that equitable relief is a matter of grace—not of right; therefore, a court of equity may decline to grant equitable relief when compelling reason is shown. However, as this Honorable Court has held, because actions at law are of right, not of grace or discretion, the principle is inapplicable to them. Those limited exceptions are not, as we have shown, available to the petitioner here.

The Mashudas of Wisconsin patiently endured the purported condemnation of their land by a County in the Commonwealth of Pennsylvania. Consistent with Pennsylvania law, they participated in a proceeding to determine the compensation to be paid for the land which was the object of the purported taking. The decision as to that compensation made by a Board of Viewers was unsatisfactory to both sides. Thereafter, again in con-

formity with Pennsylvania procedure, both sides appealed from the *amount* of the award. Only after all of these steps had been taken, did the flagrant violation of Pennsylvania law become clearly manifest when a private use was made of the land.

At that time, again consistent with Pennsylvania law and practice, the Mashudas instituted an independent proceeding to determine the invalidity of the taking and obtain a remedy therefor. With a confidence borne of the knowledge that the United States District Court for the Western District of Pennsylvania was no more related to the County of Allegheny than to them, they properly invoked its jurisdiction. Thus the question before this Honorable Court is, it is respectfully submitted, plain:—must that confidence be destroyed because the County of Allegheny prefers to have its cause heard at its home? We submit the Constitution, the Congress and this Honorable Court have decided that it must not. This is the classic case for which diversity jurisdiction was created.

For the foregoing reasons we respectfully submit that this Honorable Court should affirm the decision of the Court of Appeals and remand the case to the District Court for trial.

Respectfully submitted,

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APPENDIX I

UNITED STATES STATUTE

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy.

"(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

"(1) Citizens of different States:

"(2) Citizens of a State, and foreign states or citizens or subjects thereof;

"(3) Citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

"(b) The word 'States', as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."

PENNSYLVANIA STATUTES

16 Purdon's Pa. Stat. Ann. § 5604. "Right of damages.

"The right to damages against counties is hereby given to all owners or tenants of lands, property or material appropriated, injured or destroyed by the county in cases where the right of eminent domain has been exercised, and to all owners or tenants of lands, property or material abutting on or through which pass roads or highways injured by the laying out, opening, widening, vacating, extending or grading of such roads or highways or the changing of the grades or lines thereof, the construction and the vacation of bridges, piers and

abutments and approaches therefor, and the construction of sewers over, upon or through such lands or property."

Purdon's Pa. Stat. Ann. Section 5625:

"Payment of damages and costs; interest on awards

"All damages agreed upon or awarded and all costs and expenses incurred shall be paid by the county, except in cases where an appeal is taken by any party in interest from the award of the viewers and the appellant does not recover any greater amount than the viewers award, in which case the appellant shall pay all costs of such appeal.

"The amount of damages allowed in a report of viewers for the taking, injury or destruction of property by the exercise of the right of eminent domain shall, as finally confirmed, bear interest at the rate of six per centum per annum from the date of filing of the report."

Purdon's Pa. Stat. Ann. Section 5626:

"Collection of awards

"Upon the final confirmation of the report of the viewers, the party or parties to whom an award has been made shall have the right to take such further appropriate legal proceedings as may be necessary and proper to enforce payment of said confirmed award, either in nature of a writ of mandamus, execution or otherwise."

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IN THE

Supreme Court of the United States

NO. 347

OCTOBER TERM, 1958

COUNTY OF ALLEGHENY, Petitioner,

v.

FRANK MASHUDA COMPANY, a partnership, and FRANK MASHUDA, STANLEY MASHUDA, BERNIE MASHUDA, and JOSEPHINE MASHUDA, partners, Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S PETITION FOR REHEARING OF DECISION AND FOR MODIFICATION THEREOF

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B

SUMMARY OF ARGUMENT

Petitioner respectfully submits that modification of this Court's decision is necessary to avoid: (I) Conflict —invited by this Court's decision—between the federal courts and the Pennsylvania state courts on the question of a state court's jurisdiction; (II) inconsistency between (a) this decision and (b) the decisions in two companion cases argued together and announced together with this case, and various prior circuit court decisions; and (III) conflict in interpretations of Pennsylvania case law.

In this case the district court dismissed respondents' complaint because of pending state court proceedings. The court of appeals reversed and ordered that the case be tried on the merits. This Court affirmed. To avoid the objections set forth above, the decision of the court of appeals should be modified so that its mandate to the district court would require the district court to retain jurisdiction of the case before it for immediate submission in the pending state court proceedings of the question of the state court's jurisdiction. This modification is clearly called for under the opinion in *Louisiana Power & Light Company v. City of Thibodaux*, (398 Oct. Term 1958) and would also be consistent with *Martin v. Creasy*, (157 Oct. Term 1958).

I. Such Modification of This Court's Order Would Avoid Any Conflict Between the Federal and State Courts On Questions of Jurisdiction and Res Judicata.

If the state court decides it has jurisdiction of the issue of the invalidity of the taking here involved, there is nothing more for the district court to do. If the state court decides it does not have jurisdiction, the district court can proceed with its case. The procedure would avoid a head-on conflict between the state and federal courts, foster orderly administration of justice; and accord to both a political subdivision division and to an individual litigant all the rights to which they are entitled.

The majority of the Court apparently was led to its decision by two assumptions which did not meet the County's position. First, the Court treated the case as though the district court was merely required to pass

upon a phase of eminent domain law. The Court states that "eminent domain is no more mystically involved with 'sovereign prerogative' (than other matters)" and that federal courts have often adjudicated issues arising from state eminent domain proceedings. *But the issue is more fundamental—it is whether a district court should determine a question of jurisdiction of a state court under a state statute.* With due deference to this Court and the federal courts, a binding decision on this question can come *only* from a state court, and the federal court's decision would be a nullity.

It is this view of the case which led the Court to err in its view that "the County's theory is that a holding that the taking was invalid . . . would be *res judicata* on the parties in the Board of Viewer's proceedings." It was, and is, the County's position that if the state court determines that respondents are bound in the state proceeding by their admission of the validity of the taking (unless opened by the respondents in that proceeding) a serious question would arise whether the district court proceeding could be *res judicata, even if its proceeding concluded first,* a delicate question which could easily be avoided by submitting the question first to the state court. This situation is unlike the situation in *Kline v. Burke,* 260 U.S. 226 (1922) which did not involve a state court's jurisdiction.

II. The Decision Is Inconsistent With and Contradicts the Decisions and Opinion of the Court in Martin v. Creasy (157 Oct. Term, 1958) and Louisiana Power and Light Company v. City of Thibodaux (398 Oct. Term, 1958).

A. *Martin v. Creasy*

In the instant case, the fundamental issue concerns the jurisdiction of a state court; there was a *pending state court proceeding* involving the parties; and there was no question of irreparable injury to respondents. In the *Creasy* case, the court could have decided the question involved without passing upon the jurisdiction of a state court; there was an important federal question involved; the court found irreparable injury threatened to the landowners involved; and there *was no pending state court proceeding*. Yet, in the *Creasy* case, the lower court was instructed by this Court not to try the case on the merits, and in the instant case the district court was directed to try the case on the merits.

Nor can the different results be justified by the explanation that in the instant case the state law as found by the court of appeals was clear. For in the *Creasy* case, which also arose in the third circuit, the three-judge court also found the Pennsylvania law to be "clear"; frankly, its finding of Pennsylvania law in that case has far more support in Pennsylvania case law than its finding of law in the instant case. Yet this Court—despite all the difference in the two cases as pointed out above—accepts the court of appeal's finding of state law in the instant case and rejects its finding of state law in the *Creasy* case.

Peculiarly enough, in the *Creasy* case, the three-judge court first refused to rule on the state question and caused plaintiffs to institute state court proceedings. Also, peculiarly enough, the state court to which the parties went stated that the legal question involved must be determined in an eminent domain proceeding, which determination was based upon *Gardner v. Allegheny County*, 393 Pa. 120, 142 A. 2d 187 (1958), a case which the court of appeals and this Court ignored in the instant case.

As a matter of fact, from start to finish, at every stage of the proceedings, the *Creasy* case and the instant case are now contradictory and will cause confusion in this field of comity between the state and federal courts.

B. *Louisiana Power & Light Company v. City of Thibodaux.*

In this case the district court in Louisiana retained jurisdiction of a suit brought before it and instructed the parties to institute a suit in a state court in order to have a state court determine the interpretation of a state law on eminent domain involved in the case. The reason that the district court gave for abstaining from exercise of its jurisdiction was that an opinion of the attorney general of the state was in conflict with the language of an old and uninterpreted state statute and that therefore the question should be determined by a state court. Here, in the instant case, the county solicitor's office earnestly and sincerely takes the position, based upon its extensive experience with eminent domain law and cases, that under *Gardner v. Allegheny County, supra,* the state had exclusive jurisdiction in

the pending state court proceeding to try the issue of the validity of the taking.

Again, based upon the decision in the *Louisiana* case, which is consistent with the decision in the *Creasy* case, *a fortiori*, in the instant case, the district court should retain jurisdiction while the state court has an opportunity to pass upon the question. Again, petitioners wish to emphasize that the *Louisianna* case, as the *Creasy* case, involves only the question of the interpretation of a state statute which, from a constitutional point of view, would be binding upon the litigants and upon the state courts. In the instant case, as stated above, what is involved is the question of a state court's jurisdiction, and the state court cannot be bound by a determination of that jurisdiction by a federal court.

C. *Existing Circuit Court Cases*

Petitioner's brief at the argument referred to many decisions of circuit courts which would be inconsistent with the decisions of the Court of Appeals of the Third Circuit in the instant case. Merely to emphasize the confusion which the present decision would create in the circuits, we wish only to refer briefly to the case of *Prouty v. Citizens' Utilities Company*, 357 F.2d 692 (2 Cir. 1958), *cert. den.* October 20, 1958, discussed in petitioner's principal brief. We respectfully submit that the *Prouty* case involved the same question as is involved in the instant case, that is, a question of the jurisdiction of a state court in a pending state court proceeding, and now, under the decision of this Court, we have two circuit courts directly in conflict, which was one of the rea-

sons which prompted petitioner to request *certiorari* in this case.

III. The Conclusion of the Court of Appeals As to Pennsylvania Law, Accepted by This Court, Is Founded On Cases Which Do Not Involve the Question in the Instant Case.

Whether or not the state law is as the court of appeals says it is, or as petitioner says it is, can finally be determined only by a state court. Petitioner does not intend to enter into any extended discussion of the state law since, if modification of this Court's decision is made, there is no necessity to rule on the state law. However, petitioners briefly desire to point out to this Court that the cases which it cites in support of its conclusion that the court of appeal's determination of Pennsylvania law is clear and indisputable, do not invoive the question in this case at all. Thus, in *Spann v. Joint Boards of School Directors*, 381 Pa. 338, 113 A. 2d 281 (1955), *there was no pending state court proceeding in which the question of the validity could have been litigated.* The question of jurisdiction of the court was not raised. This was probably because *Gardner v. Allegheny County, supra,* had not yet been decided. Therefore, without *Gardner v. Allegheny County* and *without any pending state court proceeding,* and with no jurisdictional question raised, there would be no reason for the state court to question its jurisdiction over the question of the validity of the taking. To say that the *Spann* case is authority for the proposition that a separate suit can be instituted in a state court to question the validity of a taking while there is then pending a state court proceeding which is an appeal from a board of viewers proceed-

ing, is to stretch the import of the *Spann* case far beyond the facts which were presented in that case.

The other cases[1] cited in the footnote by this Court have absolutely nothing to do with procedure in eminent domain proceedings by political subdivisions of the state. Those cases do not involve political subdivisions, do not involve the Second Class County Code which is the statute pertinent in the instant case, and do not involve interference with pending eminent domain state court proceedings.

The fact of the matter is that there is no case in Pennsylvania on the precise question of the state court's jurisdiction which is involved in the instant case. Petitioners respectfully submit that *Gardner v. Allegheny County, supra,* sets forth the principle that the legal question of the validity of the taking is a part of the eminent domain proceeding. In any event, if there is some question about this matter, certainly, as suggested above, retention by the district court of the suit now before it, pending submission of that question in the state court proceedings, would be the sensible and logical method to pursue.

Conclusion

For the reasons stated above, modification by this Court of its present order to permit the district court to retain jurisdiction for submission of the question of state law to the state court, in the pending proceeding between the parties, would make consistent the opinions of this Court in the three companion cases argued to-

1. *Pioneer Coal Co. v. Cherry Tree & D. R. Co.*, 272 Pa. 43; *Philadelphia Clay Co. v. York Clay Co.*, 241 Pa. 305.

gether and decided together in the field of jurisdictional conflict and comity between the federal and state courts, and would obviate conflict on any facet of this case between the federal and state courts.

Petitioners therefore respectfully request that a re-hearing be granted in this case, in which re-hearing the sole question would be whether the decision of this Court should be modified to provide for the retention by the district court of jurisdiction for speedy submission of the question of the validity of the taking in the pending state court proceedings.

Respectfully submitted,

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